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THE PATNA HIGH COURT

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1932

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THE
ALL INDIA REPORTER
1932

PATNA HIGH COURT

*** * A. I. R. 1932 Patna 1**

COURTNEY TERRELL, C. J. AND KUL-
WANT SAHAY, JJ,

The Bank of Bihar, Ltd., Patna—Petitioner—Appellant.

v.

Secy. of State and others—Respondents.

Misc. Appeal No. 90 of 1930, Decided on 22nd April 1931, from order of Judge, Patna High Court, D/- 25th October 1929.

(a) Bihar and Orissa State Aid to Industries Act (1923), S. 15—S. 15 does not empower Government to recover amount guaranteed overdraft from principal debtor unless it has been obliged to fulfil its terms of guarantee.

Section 15 merely puts the Government into the position that it should be able to recover the amount paid by it under a guarantee in the same way as it might recover the amount of a loan but it does not have the effect of giving the Government power to recover the amount guaranteed overdraft from the principal debtor unless the Government has been obliged to fulfil terms of its guarantee. [P 2 C 1]

(b) Promissory note — Endorsement—Endorsing promissory note payable on demand does not amount to payment of debt.

The fact that the promisee endorses a promissory note payable on demand executed by a company in his favour to another does not amount to a payment of debt to that other: *Maxwell v. Jameson*, 2 B. & Ald. 51, Rel. on.

[P 2 C 1]

* (c) Companies Act (1913), Ss. 171 and 232 (2)—Leave of Court is essential even in case of execution of decree obtained by Government.

There is no exception to S. 171 and the leave of the Court is essential for the purpose of proceeding to execution even in case of decree obtained by the Government. [P 3 C 1]

* * (d) Companies Act (1913), S. 171—Court cannot permit proceeding which would give priority to any creditor and which would absorb all available assets—Crown debts have no priority.

The Crown debts have no priority over other debts. It was not the intention of the legisla-

ture that the Court should be given discretion to permit proceedings which would have the effect of giving to any particular creditor a priority to which he is not otherwise entitled and which would have the effect of absorbing all the available assets. There may however be exceptional cases in which the discretion undoubtedly given to the Court may be wisely exercised: *Food Controller v. Cork*, (1923) A. C. 647, Ref.

[P 3 C 1]

*R. R. Das and B. B. Ghosh—*for Appellant.

*Government Advocate, Government Pleader and N. C. Ghosh—*for Respondents.

Courtney Terrell, C. J.—Under the Bihar and Orissa State Aid to Industries Act, 1923, the Local Government is empowered to grant aid to the local industries. In the year 1925 the Vishwakarma Mills Ltd., hereinafter called the company applied for assistance which the Local Government decided to grant under S. 4, sub-S. (b) of the Act in the form of guarantee of cash credit overdraft at the Imperial Bank. On 7th March 1925, the company executed the deed of simple mortgage of its premises and plant in favour of the Secretary of State for India in Council and the Secretary of State therein agreed to guarantee the cash credit overdraft with the Patna branch of the Imperial Bank to the extent of Rs. 7,500 reduceable annually by Rs. 500. This deed has not been produced before us but it is agreed that the terms are as above stated. No money was actually advanced however at that time. On 20th January 1928 a promissory note payable on demand was executed by the company in favour of the Government for Rs. 60,000 with interest. This promissory note was endorsed by the Local Government to the Imperial Bank on the same day the Local Govern-

ment entered into an agreement in writing with the Imperial Bank by which it was agreed that the Imperial Bank should open a cash credit overdraft in favour of the company for Rs. 60,000 that the Government should guarantee such overdraft and should endorse the promissory note to the Imperial Bank. The company overdraw its account at the Imperial Bank to an amount exceeding Rupees 60,000 but the Local Government did not in fact effect actual payment to the Imperial Bank under its guarantee until 27th September 1929. The position therefore was that the company were debtor to the Imperial Bank in respect of their overdraft but after 27th September 1929, the Local Government could have proceeded to recover from the company the amount paid under the guarantee under S. 145, Contract Act.

This course was not however followed. On 14th August 1928, the Government filed certificate proceedings under S. 20, State Aid to Industries Act, sub-S. (1) which is as follows:

"All money recoverable under this chapter including the interest chargeable thereon and costs if any incurred if not paid when they are due may be recovered by the Director from the person aided and his surety, if any as if they were public demands."

It is to be noticed that Ch. 3 of the said Act provides for the method by which the loans may be secured and S. 13 gives power to the Government to recover such loans from the borrower and by S. 15 it is enacted:

"The provisions of Ss. 9 to 13 (both inclusive) in respect of loans shall subject to any rules that may be made under this Act apply so far as may be to guarantee of cash credits, overdrafts and fixed advances with banks."

In my opinion this section merely put the Government into the position that it should be able to recover the amount paid by it under a guarantee in the same way as it might recover the amount of a loan but it did not have the effect of giving the Government power to recover the amount of guaranteed overdraft from the principal debtor unless the Government had been obliged to fulfil the terms of its guarantee. The fact that the Government endorsed to the Bank the promissory note executed by the company did not amount to a payment of the debt: see *Maxwell v. Jameson* (1). Nevertheless on 11th November 1928, the Certificate Officer decreed the claims of the

Government and the company appealed to the Collector who on 7th January 1929 dismissed the said appeal. In November 1928, the Certificate Officer attached the mortgaged properties of the company for the realization of the certificate debt and issued a sale proclamation. The company appealed to the Commissioner who postponed the sale pending the appeal which was ultimately withdrawn by the company on 20th April 1929, and the Certificate Officer after the withdrawal of the appeal issued a proclamation for a fresh sale for the recovery of the certificate debt.

In the meantime on 16th April 1926, the Bank of Bihar advanced Rs. 10,000 to the company and on 16th May 1928, sued the company for the recovery of that sum. On 24th September 1928, the Bank of Bihar filed a petition in the High Court for the compulsory winding up of the company. On 21st March 1929, a winding up order was made by the High Court and the order had the effect under S. 232, Companies Act, 1913, of compelling the suspension of the certificate execution proceedings then in progress against the company on the petition of the Government until the leave of the Court had been obtained to proceed with such execution. On 21st August 1929 therefore the Government applied in the winding up proceedings for the leave of the Court to proceed with the execution and on 25th September 1929, Wort, J., made an order, the effect of which was to allow those proceedings to continue. The Bank of Bihar and the company were made parties to the application before the learned Judge and from the order made by him the Bank of Bihar now appeals to this Bench.

Now as between the Government and the company the judgment obtained in the certificate proceeding is binding and the company cannot dispute their liability to the Government for the original debt has now become merged in the judgment. But Mr. Das contends that his client the Bank of Bihar are in no way bound by the judgment and he contends that the effect of allowing the execution obtained by the Government to proceed notwithstanding the winding up order will be to give to the Government a preference over other creditors in the winding up proceedings. But the judgment establishes a liability of the company

(1) [1921] 2 B. & Ald. 51.

which the other creditors cannot now question. But he argues that Ss. 207 and 230, Companies Act, lay down the duties of the liquidator in the distribution of the assets of the company and specify the priority in which the debts are to be paid and that a debt to the Government of this character is not of the nature which under the terms of the statute is entitled to priority. He points out that these sections correspond with similar sections in the English Companies Act and that so far as the English Act is concerned it was decided by the House of Lords in the case of *Food Controller v. Cork* (2) that Crown debts have no claim to priority owing to the effect of these sections. In my opinion this argument is well founded. The learned Judge who heard this case in the first instance based his decision upon S. 232, sub-S. (2), Companies Act. The two subsections are as follows:

"(1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court, against the estate or effects of the company after the commencement of the winding up shall be void.

(2) Nothing in this section applies to proceedings by the Government."

By S. 171:

"When a winding up order has been made no suit or other legal proceedings, shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose."

To this section there is no exception. The leave of the Court was therefore essential and indeed has been treated as essential by the Government for the purpose of proceeding in the execution and it was not the intention of the legislature that the Court should be given discretion to permit proceedings which would have the effect of giving to any particular creditor a priority to which he was not otherwise entitled and which would have the effect, as in the case of absorbing all the available assets. I do not mean to say that there may not be exceptional cases in which the discretion undoubtedly given to the Court may not wisely be exercised. I would therefore reverse the decision of the learned Judge.

The Official Liquidator will remain in possession of the property and will distribute the assets of the company in accordance with its statutory obligations.

(2) [1923] A. C. 647=92 L. J. Ch. 587=67 S.J. 788=39 T. L. R. 699.

I would allow the appeal of the Bank of Bihar with costs which must be paid by the Local Government and the Collector will hand over the assets to the Official Liquidator for distribution.

Kulwant Sahay, J.—I agree.

R.M./R.K.

Appeal allowed.

* A. I. R. 1932 Patna 3

JWALA PRASAD AND JAMES, JJ.

Shyam Sunder Koer—Appellant.

v.

Rahmatunnissa and another—Respondents.

First Appeal No. 192 of 1927, Decided on 9th June 1931.

* Civil P.C. (1908), O. 3, Rr. 2 and 4—*Vakalatnama* duly executed by appellant and accepted by pleader—Pleader's name not mentioned in margin as required—*Vakalatnama* held to be valid—Mistake held to be by inadvertence—Court held to have power under S. 151 to cure defect if any.

An appeal was presented by a vakil along with a vakalatnama duly executed by the appellant and accepted by the pleader, but the necessary corrections to suit the circumstances of the case were not made, nor was the name of the vakil stated in the margin, although the vakalatnama stated that the name of the vakil would be noted in the margin. The vakalatnama contained an endorsement on the back of it as having received from the appellant and accepted and underneath the endorsement was the signature of the vakil.

Held: that the vakalatnama was valid. The endorsement on the back created a valid contract between the appellant and the vakil and was sufficient authority for him to act in the case and present the memo of the appeal. The omission to insert the vakil's name was merely a clerical mistake and by inadvertence and was rectified by the endorsement.

The vakalatnama did not contravene provisions relating thereto in O. 3 and the Court had ample power under S. 151 to condone the defect even if there was one: 37 Cal. 379; 41 I. C. 685 and A. I. R. 1921 All. 210, *Rel. on.* [P 4 C 2]

Shiveshwar Dayal—for Appellant.

N. N. Sen—for Respondents.

Order.—The question is whether the appeal presented on 28th October 1927, is valid or not. The memorandum of appeal was signed and presented by Mr. A. B. Mukherji, who was Government Pleader at that time, with a vakalatnama containing an endorsement on the back of it "Received from the Manager, Majhouli Wards Estate and accepted." Underneath this endorsement Mr. A. B. Mukherji has signed: "Abani Bhushan Mukherji, Government Pleader," and "dated 28th October 1927." The front page of the vakalatnama, which contains the appointment of vakils, is a

printed form and is meant to be completed by filling in the number and name of the case, names of parties and the vakils appointed, and by making other corrections according to the circumstance of the case, such as I/we and my/our, etc. In this form the number of the case "F. A. No. 192 of 1927" and the names of parties

"Maharani Shyam Sunder Kuer, Appellant v. Bibi Rahmatunnissa, Respondent"

have been put in, but the other necessary corrections have not been made to suit the circumstance of the case nor have the names of vakils been stated in the margin of the vakalatnama, although the vakalatnama states that the names of the vakils would be "noted in the margin, etc." The vakalatnama was executed by the then manager, Court of Wards, Mr. Shyama Charan Ghosh, in the margin as follows:

"Vakalatnama Shyam Charan Ghosh, Manager, Court of Wards, Saran."

Mr. Shyama Charan Ghosh retired and in his place Mr. Syed Abdul Majeed was appointed Manager of Saran Court of Wards. Mr. A. B. Mukherji also ceased to be the Government Pleader and in his place Mr. Shiveshwar Dayal was appointed Government Pleader. So a fresh vakalatnama had to be filed by the Court of Wards appointing Mr. Shiveshwar Dayal in place of Mr. A. B. Mukherji. That vakalatnama is dated 16th December 1930, and was actually filed on 5th January 1931. In it in the margin on the left side the vakils appointed are stated to be Government Pleader, High Court Patna, and Government Advocate, High Court, Patna. On the right side the vakalatnama is executed in the following manner:

"Syed Abdul Majeed, General Manager, Saran Wards Estate,"

and on the back the acceptance of the vakil runs as follows:

"Received from the General Manager, Saran Wards Estate, and accepted. (Sd.) Shiveshwar Dayal, Government Pleader, 5th January 1931."

This vakalatnama is free from any defect.

The contention however is that the previous vakalatnama filed by Mr. A. B. Mukherji with the memo of appeal was defective and invalid, and consequently the memo of appeal was also invalid. We have considered the facts, the law and the authorities on the subject. The Government Pleader relies upon *Chhay-*

unnessa Bibi v. Basirar Rahman (1), *Mohfoozul Haq v. Mazkorul Haq* (2) and *Shambhu Nath v. Badri Das* (3). Mr. N. N. Sen relies upon *Ram Rup Agrahri v. Naik Ram* (4), *Mohammad Ali Khan v. Jasram* (5), *Kunj Behari Singh v. Sheodahin Pandey* (6), *Abdul Ghaffar v. Mrs. F. B. Downing* (7) and *Sheikh Palat v. Sarwan Sahu* (8). There can hardly be any doubt that the vakalatnama filed by Mr. A. B. Mukherji on 28th October 1927, was valid. The endorsement on the back of it clearly shows that the Manager, Court of Wards, appointed Mr. A. B. Mukherji as vakil, for the vakalatnama was received from the Manager himself and it was accepted by Mr. A. B. Mukherji. The aforesaid endorsement in itself creates a valid contract or agreement between the Manager and Mr. A. B. Mukherji, and it was a sufficient authority for Mr. A. B. Mukherji to act in the case and to present the memo of appeal. The body of the vakalatnama describes the powers given to the vakil by the executant, and whoever that vakil may be, he was authorized to act and appear on behalf of the Manager, Court of Wards, who duly executed the vakalatnama by signing it as stated above.

The omission of the name of Mr. A. B. Mukherji from the margin of the vakalatnama on the front page of it was rectified by the endorsement on the back of it, and Mr. A. B. Mukherji did act in consonance with the agreement inasmuch as he filed the memo of appeal duly signed by himself. It is clear from the endorsement on the back of the vakalatnama and the execution thereof on the front page that the omission of the name of Mr. A. B. Mukherji from the margin on the front page of the vakalatnama was merely clerical and by inadvertence, as also the omission to strike out I or We, etc., from the body of the vakalatnama. The vakalatnama in question has not contravened the provisions relating thereto contained in O. 3,

(1) [1910] 37 Cal. 399=5 I. C. 532.

(2) [1917] 41 I. C. 685.

(3) A. I. R. 1921 All. 210=61 I. C. 410=43 All. 392.

(4) A. I. R. 1926 All. 252=91 I. C. 865.

(5) [1913] 36 All. 46=23 I. C. 464.

(6) A. I. R. 1922 Pat. 504=68 I. C. 659.

(7) A. I. R. 1926 Pat. 246=94 I. C. 841=5 Pat. 255.

(8) [1919] 55 I. C. 271.

Civil P. C. Rr. 2 and 4 do not make such a vakalatnama invalid. Those rules simply forbid a pleader from acting in any case unless he had been duly appointed by the client. Here by the vakalatnama in question Mr. Mukherji was duly appointed as the endorsement on the back of it as well as the execution on the front page of the vakalatnama show. Therefore the vakalatnama in question was valid and the appeal was properly presented. Whatever defect there might have been, it was cured by the subsequent vakalatnama filed by Mr. Shiveshwar Dayal on 5th January 1931.

In these circumstances the appeal is properly filed and there is no occasion for invoking the aid of Ss. 148 and 151, Civil P. C., or Ss. 5 and 14, Limitation Act. Even if there was any such occasion the Court has ample powers under S. 151 to deal with the question and to condone the formal defect in the vakalatnama.

The next question is the setting aside of the abatement of the appeal with regard to the deceased respondent 2 and substituting her heirs. The reasons for not bringing the heirs of the deceased respondent 2 on the record in time have been set forth in the sworn petition filed on behalf of the appellant, and there is no counter-affidavit challenging the same. The reasons appear to be good and are accordingly accepted, and the abatement is set aside, and the names of the heirs of the deceased respondent 2 be substituted.

R.M./R.K.

Order accordingly.

A. I. R. 1932 Patna 5

MACPHERSON, J.

Malik Mokhtar Ahmad—Appellant.

v.

Akloo Mahto and others — Opposite Parties.

Letters Patent Appeal No. 126 of 1930, Decided on 9th February 1931.

Bengal Tenancy Act (1885), Ss. 102 (h) and 103 (B)—Entry of "Kul haq raiyat" in respect of trees carries presumption under S. 103 (B).

The entry "kul haq raiyat" (all rights with the tenant) in respect of trees in the Record of Rights is an entry of a special incident of the tenancy under S. 102 (h) which carries the presumption under S. 103 (B) of the Act: *A. I. R. 1922 Pat. 497*; *A. I. R. 1927 Pat. 376*; *A. I. R. 1931 Pat. 209*; *A. I. R. 1931 Pat. 263* and *12 P. L. T. 304, Foll.*; *57 I. C. 126*; *A. I. R. 1926 Pat. 68*; *Pat. Civ. Revn. No. 403 of 1930, not Foll.* and *40 I. C. 987, Disc.* [P 6 C 2]

Khurshaid Husnain and Q. Nazrul Hussain—for Appellant.

Judgment.—This is an application for permission to appeal under the Letters Patent against the dismissal of a second appeal under O. 41, R. 11. As Mr. Khurshaid Husnain has pressed the point very strenuously, I adopt the somewhat unusual course of recording my reasons for refusing permission.

Appellant sued for damages in respect of palm trees alleged to have been cut and appropriated by the defendants from lands within his zamindari. The defence was that the trees stood on the nakdi lands of some of the defendants and that the trees were the property of the raiyats of the land who had cut them. The defence adduced the entry in the Record of Rights in respect of the trees which is kul haq raiyat.

The Munsif in an elaborate judgment dismissed the suit on the finding that the plaintiff had failed to rebut this entry in the Record of Rights and was not entitled to any damages since the whole property in the trees belonged to the raiyat including the felled timber. An appeal failed on the same grounds. Prima facie the decision is sound.

It is now urged by Mr. Khurshaid Husnain that no presumption of correctness attaches to the entry "kul haq raiyat" since it is an entry recording a local custom and so is outside the scope of an incident of a tenancy such as is referred to in S. 102 (h), Ben. Ten. Act. He relies upon the decisions in *Raghubir Misra v. Bhajan Singh* (1), *Suresh Chandra Rai v. Sitaram Singh* (2), *Debi Dayal Singh v. Ganga Kuer* (3) and the judgment in *Sheopratap Sahi v. Sheonandan Pandey* (4) which followed the last mentioned case.

The head-note in *Raghubir Misra v. Bhajan Singh* (1) which is:

"An entry in the Record of Rights cannot have the effect of overruling well-settled principles of law where such entry conflicts with the established law, the established law must prevail over the entry, and the presumption attaching to the entry must be deemed to have been rebutted"

does not really represent the actual decision. The point in controversy was the ownership of some palm trees which stood on the plaintiff's side of an ar or

(1) [1917] 40 I. C. 987.

(2) [1920] 57 I. C. 126.

(3) *A. I. R. 1926 Pat. 68*=*89 I. C. 1020*.(4) *Pat. Civ. Revn. No. 403 of 1930*.

boundary fence and therefore within his plot but which were shown in the Record of Rights as belonging to the defendants. As an examination of the record of the second appeal shows, the lower appellate Court had set out:

"I do not think there can be any doubt that the settlement entry is mistaken . . . and not in accordance with its own practice,"

and had found that the correctness of the entry had been rebutted and that in fact the trees had been recently planted by the defendants in the plaintiff's land without permission. The only point for decision therefore was no more than whether the entry prevailed in face of the finding of fact that it had been rebutted. The appeal being obviously concluded by the findings of fact, the other observations in the judgment are obiter. They are also in direct conflict with the decision in *Bishun Pergash v. Seosaran Teli* (5), where it was held that the presumption attaching to an entry in the Record of Rights is not rebutted merely by showing that the entry is contrary to the general law on the subject with which the entry deals and therefore where the Record of Rights contained an entry that the trees belonged to the tenants, it was held that the mere fact that ordinarily the law gives to the landlord the full right in respect of the timber was not sufficient to rebut the presumption arising from the entry. Indeed with all respect they appear to be altogether contrary to the plain provision of the statute.

In *Suresh Chandra Rai v. Sita Ram Singh* (2) it was held by a single Judge that a village custom is not one of the particulars which have to be recorded under S. 102 (h), Ben. Ten. Act, and if it is recorded there is no presumption under S. 103 (B), Ben. Ten. Act, that it is correct, though it is relevant evidence under S. 35, Evidence Act, and accordingly the burden of proving existing custom lies on the party who relies on the custom. Now the question for decision was whether the entry in the Record of Rights

"if there is produce, the landlord gets rent upon measurement of the lands at the rate of Rs. 2-8-0 per bigha,"

made in respect of a holding in the kosi area was a "special incident of the tenancy" and the decision was that as

the defendants did not in their written statement contend that this was a special condition of the tenancy but alleged local custom in derogation of the common law right of the landlord, the entry in the Record of Rights did not support the case of the defendants as put forward by them. There is no suggestion that if the defence had alleged that it was an incident of the holding that the tenant paid only on the measured area of the land on which there was produce instead of alleging custom, the entry in the Record of Rights would not under S. 103(B), Ben. Ten. Act, have carried the presumption of correctness. In addition the view that an entry cannot be made under S. 102 (h), of the special conditions and incidents of a tenancy simply because these are in accordance with the local custom is one to which, as at present advised, I am not prepared to subscribe. The decision of Das, J., has been considered by James, J., in *Singheswar Chaudhuri v. Parbat Mandal* (6) where the entry with regard to an under raiyat was shikmi dakhalkar. He observed:

"It cannot be assumed as a matter of course that the entry of shikmi dakhalkar in the Record of Rights must have followed on decision of the Revenue Officer on the question of local custom but the defendant, apart from his reliance upon the entry in the Record of Rights, now founds his case upon local custom and Mr. S. N. Bose argues that it should be presumed that he always did so. Now, although it may be conceded that a Revenue Officer may be travelling out of his sphere when he records as a special incident of every tenancy in that village a local custom by which special remissions may be made in time of flood as was held by Das, J., in the case of *Suresh Chandra Rai v. Sitaram Singh* (2), that decision should, I think, be read with reference to the particular facts of the case then under discussion, and it should not, I would respectfully submit, be extended to support a general rule that no incident of a tenancy, how vitally it may affect the status of a tenant, can be properly recorded under S. 102 (h), Ben. Ten. Act, if the right or the liability recorded is based on the existence of a local custom.

Where occupancy rights may be obtained by a tenant as a result of local usage or by any other means, the Revenue Officer, whose duty it is to frame the Record of Rights must, I think, record as an incident of the tenancy the fact that the tenant possesses such rights. Revenue Officers are required under S. 102 to enter the class to which the tenant belongs, the situation and a quantity of his land, the rent payable by him, the mode in which that rent has been fixed and special conditions and incidents, of any, of the tenancy. If the undertenant enjoys occupancy rights, that is to say, if he is free from

(5) A. I. R. 1922 Pat. 497=69 I. C. 866=1 Pat. 368.

(6) A. I. R. 1927 Pat. 376=103 I. C. 471.

liability to eviction under S. 49, Ben. Ten. Act, and if he enjoys special privileges under S. 113, of the Act with regard to the period during which a settled rent cannot be enhanced, a Record-of-Rights which omits to mention this special incident of the tenancy, that the under-riyat enjoys occupancy rights, would be certainly defective in most important particulars."

With these remarks I respectfully agree.

The decision in *Debi Dayal Singh v. Gango Kuer* (3) expressly followed the decision in *Suresh Chandra Rai v. Sitaran Singh* (2) and extended it to the case of an entry in the Record of Rights in respect of the rights of raiyats in the fruit and timber of trees standing on their holdings where the entry was kul haq raiyat. The decision was that the entry was not one with regard to the incidents of the tenure and did not carry with it the presumption of correctness under S. 103-B. It was on this decision that Mr. Khurshaid Hasnain laid most reliance. But upon sending for the original record of the case, I find that the decision had been reversed in *Debi Dayal Singh v. Gango Kuer* (7), Foster, J., in delivering the judgment of the Court observed :

"The entry kul haq raiyat is an entry of a special incident of the tenancy directly authorized in item (h), S. 102, Ben. Ten. Act. There is no suggestion in the entry itself or in the record of the case that this incident arises out of any custom. It may just as possibly arise from contract. It is certainly a special incident of this tenancy as it stands recorded, and there is no apparent reason why the presumption of its correctness should be removed from it."

This decision was not mentioned in argument. Indeed the serious danger of citing unauthorized law reports is well illustrated by the present case. It is highly reprehensible of compilers of such report or of any law reports to omit to report the judgment of the appellate Court reversing the decision in a case which they have reported and there can be no doubt that their failure to do so in this instance has occasioned much harm in the Courts of this Province. Steps will now be taken to have the decision reported in the Patna Series of Law Reports. I am impelled to observe that a decision in second appeal should rarely be reported until any appeal preferred against it under the Letters Patent has been determined.

In the fourth case mentioned the decision in *Debi Dayal's* case (3) was adduced

(7) A. I. R. 1931 Pat. 209=132 I. C. 865=10 Pat. 311.

before the Judge of this Court without any mention of the fact that it had been reversed in appeal and the learned Judge without committing himself to it guardedly directed a consideration of the evidence.

The point which was urged before me was that the matter was in doubt in view of the three decisions of single Judges cited on behalf of the appellant and the decision of James, J., which differed from them. But in my opinion there is no doubt at all by reason of the decision in the Letters Patent Appeal (8), which definitely holds that the entry kul haq raiyat in respect of trees is an entry of a special incident of a tenancy which carries the presumption under S. 103-B, Ben. Ten. Act. The same view is implied in the decision in *Bishun Pragash Narain Singh v. Sheosaran Teli* (5), already cited and was taken in *Bidya Prasad Singh v. Surkhur Maton* (8). There the controversy was with regard to an entry in respect of trees and the Court held:

"The entry in the Record of Rights, which was made under S. 102 (h), Ben. Ten. Act, is evidence that as an incident of his tenancy the plaintiff is entitled to appropriate the timber of his trees and S. 103-B of the Act, provides that this entry must be presumed to be correct until the contrary is shown."

The same view has been admirably set out by Ross, J., in *Matukdeo Narain v. Sadhusaran Ojha* (9), decided within the last ten days.

There is thus no doubt at all as to the law which is entirely against the contention of the appellant and the second appeal was correctly dismissed in limine.

The application is refused.

K.N./R.K. *Application refused.*

(8) A. I. R. 1931 Pat. 263.

(9) [1931] 12 P. L. T. 304.

A. I. R. 1932 Patna 7

WORT AND MOHAMAD NOOR, JJ.

Timan Shaikh—Appellant.

v.

Salabat Mahata and others—Respondents.

Appeal No. 491 of 1929, Decided on 15th January 1931, against appellate decree of Sub-Judge, Manbhum, D/- 19th May 1928.

(a) Landlord and Tenant—Surrender of portion of holding—Relative position of parties depends upon contract.

In the case of surrender of only part of the holding the relative position of the parties depends upon contract. It cannot be done except by mutual consent and the landlord and tenant

by coming to an agreement among themselves cannot defeat the rights of a third person.

[P 9 C 2]

(b) **Landlord and Tenant—Re-entry—Right of re-entry accrues only on surrender of whole holding.**

In order to re-enter there must be surrender of the whole holding, and without such right of re-entry, the rights of a tenant of a portion of the holding cannot be affected, when the landlord re-enters a portion of the holding occupied by another tenant : *A. I. R. 1924 Pat. 100* and *A. I. R. 1924 Pat. 1, Dist.*

[P 9 C 1]

R. S. Chattarji—for Appellant.

S. C. Mazumdar—for Respondents.

Wort, J.—This appeal arises out of an action in which the plaintiff claimed a declaration that he had a permanent jote jama right in half of the lands described in one of the schedules to the plaint and for an order for possession of that share and for possession of half share of the other land described in the same schedule. The circumstances under which the case arose were these : One Khudu Mahatani possessed raiyati interest in a certain property in which were two tanks. On some date in or about 1894 there was a money decree against Khudu's husband. The property was put up for sale and was purchased by the landlord Mohar Mia. After this sale and about the year 1900 the landlord Mohar Mia granted a settlement to the widow Khudu of the same land. About six years after that date the widow sold the tanks which are in dispute in this action to defendant 2. Then Khudu died leaving two sons one of whom I shall describe as the elder and the other younger son, and the younger son shortly afterwards surrendered his interest in the land to the landlord. The plaintiff took settlement of this half-share surrendered by the younger son. The plaintiff in those circumstances brought this action for the relief which I have stated. Before the learned Munsif the plaintiff succeeded in his action, but when the matter came before the learned Subordinate Judge the result of his decision was that the suit of the plaintiff was dismissed and hence this appeal.

The contention of the learned advocate on behalf of the plaintiff is this that as a result of the surrender by the younger son of his interest in the land and the settlement to him the plaintiff is entitled to get joint possession of the tanks in dispute. The question depends

upon the effect of the surrender of the younger son. It seems to me perfectly clear as this comes from Manbhum District that the Act which applies is the Rent Act, 1859 (Act 10 of 1859). But even assuming for the moment that the Chota Nagpur Tenancy Act applies to the case, the position of the plaintiff, in my judgment, would be no better. S. 72, Chota Nagpur Tenancy Act, gives the right to the tenant to surrender his whole holding, it being as I have stated a statutory right to surrender. Sub-S. 5, S. 72 provides that nothing in the section shall affect any arrangement by which a raiyat and his landlord may arrange for a surrender of the whole or a part of the holding. Sub-S. 4 provides that when there has been a surrender of the whole holding the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself.

Now the point in substance is this : whether in the events which have happened the surrender of half of the land, that is the interest of the younger son, the landlord is entitled to re-enter. The section to which I have referred recognizes that right of re-entry only in the case of a surrender of the whole holding. The Rent Act of 1859 makes no provision similar to that provided by sub-S. 5, S. 72, Chota Nagpur Tenancy Act ; in other words that the tenant has the right to surrender a part of his holding. But quite apart from the statutory law, it is perfectly obvious that in the case of a surrender of part of the holding only, the relative position of the parties depends upon contract. In this case it is argued having regard to the relief which is sought in the case that the landlord is entitled to re-enter and therefore entitled to settle with the plaintiff ignoring the interest of defendant 2 in the tanks. The learned advocate who appears on behalf of the appellant relies upon two cases, the first being the case of *Ram Oraon v. Doman Kalal* (1). That was a case in which there had been first the mortgage of a part of the holding and then a second mortgage of the other part with the exception of the homestead land. Now the conclusion at which Jwala Prasad and Ross, JJ., came in that case was that in those circum-

(1) *A. I. R. 1924 Pat. 100=75 I. C. 209=2 Pat. 898.*

stances when there was a subsequent surrender of the whole holding with the exception of the homestead land, the two mortgages can be avoided. The decision is based on two facts. The case first of all was based on the assumption that it was a surrender of the whole holding and second the mortgages which had been brought into existence were mortgages for a period exceeding five years could be avoided.

The next case which was relied upon was the case of *Mt. Sheoraji Kuer v. Dhani Mian* (2). The same question came up for consideration, but there again the basis of the decision was that it was a surrender of the whole holding. The learned advocate who appears on behalf of the appellant relies upon a passage in the judgment of Mullick, J., in which he says :

"With regard to the surrender of a part of the holding S 86 (this is S. 86, Ben. Ten. Act) shows that the right of surrender in this case is conditional on the landlord's consent ; but once the landlord does consent the position is the same as in the case of the surrender of the entire holding. In effect the surrender of a portion of the holding, whether it be of the portion already transferred or of the other portion, entails a surrender of the entire holding;" but he adds towards the end of that passage :

"The landlord's right of re-entry is based upon the view that the transfer of the entire holding by sale constitutes abandonment. I take it that the sale of a portion and the surrender of the rest has the same result."

The learned advocate who appears on behalf of the appellant relies upon these observations and contends that the effect of the surrender of the part is the same as the surrender of the whole. But even assuming that that was what the learned Judge intended to say, it is quite clear from the facts of the case that the case was one of surrender of the whole holding, therefore to that extent those observations of the learned Judge were mere obiter and not binding on this Court. It seems to me quite clear and no argument has been advanced by the learned advocate which would in any way shake that proposition of law, namely, that in order to re-enter there must be surrender of the whole holding and without that right of re-entry, the rights of defendant 2 in this case could not be affected. It is quite clear in this case that what has been

surrendered is a portion of the holding only, and therefore the right of re-entry on the part of the holding did not exist.

For those considerations, it seems to me that the decision of the learned Subordinate Judge is right and the appeal should be dismissed with costs.

Mohamad Noor, J.—I agree. In my opinion there is a good deal of difference between the surrender of an entire holding and the surrender of a portion of the holding. Surrender of an entire holding without the consent of the landlord is a statutory right given to a raiyat, and therefore the statutory consequences will follow and one of them is this : that the occupancy right comes to an end and the landlord is entitled to re-enter upon the land disregarding all the acts done by the late raiyat. The surrender of a part of the holding is a matter of contract between the landlord and the raiyat and it cannot be done except by mutual agreement and when this is so, it is obvious that the landlord and tenant by coming into an agreement among themselves cannot defeat or destroy the right of a third person and the equitable doctrine that a person cannot be allowed to derogate from his own grant applies in this case. It will not be proper to base the decision of the case of a part surrender on the principle which underlies the surrender of an entire holding. For this reason I agree that the appeal be dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 9

MACPHERSON AND SCROOPE, JJ.

Ramcharitar Panday and others—Petitioners.

v.

Basgit Rai and others—Opposite Parties.

Civil Revn. No. 585 of 1930, Decided on 15th June 1931, against order of Dist. Judge, Shahabad, D/- 25th August 1930.

(a) Court-fees Act (1870), S. 7 (4) (c)—**Plaintiff must fix reasonable valuation—Court can go behind arbitrary valuation and can revise it.**

A plaintiff seeking consequential relief is bound to fix a reasonable valuation. The Court is empowered to revise the valuation put by the plaintiff and if on such revision it is of opinion that the valuation is insufficient or arbitrary it has jurisdiction to fix a right value : 5 P. L. J. 394 and A. I. R. 1929 Pat. 626, *Rel. on.*

[P 10 C 2]

(b) Civil P. C. (1908), S. 115—**Court basing its decision on purely speculative factors**

(2) A. I. R. 1924 Pat. 1=75 I. C. 794 =3 Pat. 1 (F. B.).

about which there is no evidence acts with substantial irregularity.

Where the decision of the lower Court is too arbitrary and is based on factors which are purely speculative and about which there is no evidence, the Court in so deciding the case acts with substantial irregularity, so as to make S. 115 applicable. [P 11 C 1]

B. P. Sinha—for Petitioners.

Govt. Pleader—for Opposite Parties.

Scroope, J.—This is an application under S. 115, Civil P. C., arising in the following way : The plaintiffs brought a suit for a declaration that a certain plot No. 31 in mauza Duria is gairmazrua-am and an ahar and that they have a right to irrigate their lands in mauza Pararia from this ahar. They also sought for an injunction against the opposite party to restrain them from cutting the embankment and filling up its bed. Thus the suit, it is not disputed, was a suit to obtain a declaratory decree with consequential relief in the shape of an injunction and therefore came within S. 7, Cl. 4, sub-S. (c), Court-fees Act. The suit was valued at Rs. 25 only and the learned Munsif on objection by the defendants as to jurisdiction held that the valuation assigned by the plaintiffs was arbitrary and that it should be fixed proportionate to the loss of which the plaintiffs sought to be relieved ; this he found to be Rs. 2,400, and as this figure was beyond his pecuniary jurisdiction he returned the plaint for presentation to the proper Court. The decision was upheld on appeal by the learned District Judge of Shahabad and an application is now made under S. 115, Civil P. C., to this Court in which it is contended that the plaintiffs are entitled to put their own valuation on the relief sought and that the first Court had no jurisdiction to interfere with it.

The learned advocate cites in support of his contention a number of rulings of which *Hari Shankar v. Kali Kumar* (1) and *Panna Lal v. Abdul Gani* (2) are typical. There is no doubt that in some of the High Courts there is a conflict of view on this matter and in Calcutta itself we need only refer to *Umatul Batul v. Nauji Kuar* (3) and *G. M. Falkner v. Mirza Mahomed Syed* (4) for the opposite

view, that the Court is empowered under the law to revise the valuation put by the plaintiff and if on such revision it is of opinion that the valuation is insufficient or arbitrary it has jurisdiction to fix a right value.

However in this Court the consistent view has always been taken that when consequential relief is sought the plaintiff is bound to fix a reasonable valuation. I refer for instance to *Shama Pershad Sahi v. Sheo Pershad Singh* (5), *Brij Krishna Das v. Murli Rai* (6) and *Gauri Lal v. Raja Babu* (7). The learned advocate for the petitioners argues however that these cases and the other cases of this Court, which have dealt with the question, are cases where the value on the face of it was arbitrary and demonstrably wrong ; for instance, cases where it is sought to get rid of the effect of decrees or sale deeds and the money value is easily ascertainable, he contends that in a matter like the present, namely, a suit relating to an easement, the relief is incapable of valuation. There is however no ground for discriminating under the Court-fees Act between the two classes of cases and it seems to me perfectly clear that having regard to the fact that this case involves irrigation rights over a considerable area of land the valuation of Rs. 25 is *prima facie* purely arbitrary and inadequate and the learned advocate for appellant does not dispute this. In my opinion the contention of law that the Court has no right to go behind the plaintiff's valuation cannot be sustained, in view of the decisions of this Court. Moreover, it must be remembered that in the present case the point was raised by the defendants : to accept the learned advocate's contention is equivalent to saying that the plaintiffs could drag the defendants to any Court they please ; but in his second contention the learned advocate for the petitioners is on a stronger ground. He complains that, assuming his valuation is arbitrary, the assessment of the learned Munsif is just as arbitrary. The valuation was arrived at by the learned Munsif in the following way : The plaintiffs stated that the disputed ahar could irrigate 70 to 80 bighas of land per year and that the water rates of the Canal Department

(1) [1905] 32 Cal. 734=9 C. W. N. 690.

(2) A. I. R. 1930 Cal. 473=127 I. C. 665.

(3) [1907] 6 C. L. J. 427=11 C. W. N. 705.

(4) A. I. R. 1925 Cal. 814=86 I. C. 853.

(5) [1920] 5 Pat. L. J. 394=41 I. C. 95.

(6) [1919] 4 Pat. L. J. 703=56 I. C. 316.

(7) A. I. R. 1929 Pat. 626=123 I. C. 634

are Rs. 1-8-0 to Rs. 2 per bigha. The learned Munsif therefore concluded that if the plaintiffs did not get water from the disputed ahar they will have to spend Rs. 160 a year for getting it from the canal and he multiplied this by 15 and arrived at a total of Rs. 2,400. In my opinion this was much too arbitrary a method to adopt. There are other methods of irrigation besides canal for instance, wells ; and the plaintiffs might be able to achieve their ends by digging several wells at a much smaller cost than Rs. 2,400 ; again they might be able to come to terms with the defendants and get from them irrigation facilities for a great deal less than Rs. 2,400. The defendants have challenged the plaintiffs' valuation ; it was incumbent on them to produce some evidence as to the actual value of the relief sought ; there is no reference to their evidence in either of the judgments. There is another consideration : canal irrigation is more elaborate and thorough and therefore more expensive than the village system by ahar which is in question here. It may be that a less elaborate system would suit the plaintiffs' needs ; but what the learned Munsif has done is to take the highest rates of the most expensive system ; if instead of taking 80 bighas at Rs. 2 he had taken 70 bighas at Re. 1-8-0 the value of the suit would have worked out at Rs. 1,575 and that would have been within the Munsif's pecuniary jurisdiction. Moreover it is not clear in either of the judgments of the Courts below what area the plaintiffs propose to irrigate from the ahar in question : the area of 70 to 80 bighas is the maximum the ahar is capable of irrigating, but the area of the plaintiffs' land affected may be less. This point requires to be cleared up.

In my opinion the decision is far too arbitrary and is based on factors which are purely speculative and about which there is no evidence ; and in my opinion the learned Munsif acted with substantial irregularity in so deciding the case and equally so the learned District Judge in confirming his decision. I consider therefore that the application attracts S. 115, Civil P. C., and I would remand the case to the learned Munsif for reconsideration on these lines setting aside the order complained of and allowing the parties to produce any additional evidence they please on the question of valuation.

There will be no costs in the present matter.

Macpherson, J.—I agree.

R.M./R.K.

Case remanded.

A. I. R. 1932 Patna 11

KULWANT SAHAY, J.

Brundaban Das — Plaintiff — Appellant.

v.

Bandhu Padhan—Defendant — Respondent.

Appeal No. 42 of 1929, Decided on 30th March 1931, against appellate decree of Dist. Judge, Cuttack, D/- 22nd December 1928.

Civil P. C. (1908), O. 7, R. 11 and O. 9, R. 9—Dismissal of suit for nonpayment of proper court-fee — Fresh suit is not barred under O. 9, R. 9 but case comes under O. 7, R. 11.

Where the plaintiff's suit is not dismissed for default on merits but is really a rejection of the plaint for nonpayment of the proper court fee, the case comes under O. 7, R. 11, and a fresh suit on the same cause of action is not barred under O. 9, R. 9. [P 12 C-1]

B. Mahapatra—for Appellant.

S. C. Chatterji—for Respondent.

Judgment.—The plaintiff as the landlord instituted a suit before the Deputy Collector of Khurda against the defendant whom he described as his agent for accounts. A preliminary decree was made by the Deputy Collector for accounts. Against that preliminary decree the defendant went in appeal before the District Judge. The District Judge has dismissed the suit on a preliminary ground without going into the merits of the appeal on a finding that the suit was not maintainable inasmuch as a previous suit instituted by the plaintiff on the same cause of action had been dismissed for default on a previous date and the present suit was barred under O. 9, R. 9, Civil P. C. The previous suit was dismissed on 23rd December 1927 under the following order :

"Plaintiff absent. The court-fee has not been paid nor the certificate produced. The defendant is present. The plaintiff takes no steps. The case is struck off for default. The plaint is rejected."

The question is whether by this order there was a rejection of the plaint for nonpayment of the deficit court-fee or whether it was a dismissal of the suit for default. The certificate referred to in the order of 23rd December 1927 was a certificate which the Deputy Collector wanted the plaintiff to produce from the

Munsif to the effect that the deficit court-fee had been paid in his Court and was still unused. Therefore it is clear that the plaintiff's suit was not dismissed for default on merits but it was really a rejection of the plaint for nonpayment of the proper court-fee, and it came under O. 7, R. 11. It is remarkable that this objection was taken in the written statement before the Deputy Collector, yet it was not pressed before him at the trial. The Deputy Collector who passed the order of 23rd December 1927 was the same officer who subsequently tried the present suit and made the preliminary decree and he was the best person to interpret his own order of that date.

I am of opinion that the view taken by the District Judge was not correct and the suit was not barred by O. 9, R. 9, Civil P. C. The result is that the decree made by him will be set aside and the case remanded to him for disposal according to law. Costs will abide the result.

B.V./R.K.

Case remanded.

A. I. R. 1932 Patna 12

MACPHERSON AND MOHAMAD NOOR, JJ.
Bhudaram Marwari and others—Decree-holders—Appellants.

v.

Udai Narayan and others—Judgment-debtor—Respondents.

Misc. Appeal No. 48 of 1931, Decided on 17th July 1931, against order of Addl. Sub-Judge, Bhagalpur, D/- 26th November 1930.

(a) **Execution—Executing Court has to interpret decree for which it can refer to pleadings.**

It is the duty of the Court executing a decree to interpret it and to find out what the decree has really granted; and for this purpose the Courts are entitled to refer to the pleadings and ascertain to what extent the decree can be executed.

In order to find out whether a decree can be executed against a judgment-debtor personally, the Court must find out the basis of the decree and for this purpose they are entitled to refer to the plaint of the suit: 2 *P.L.T.* 396 and 25 *C.W.N.* 54 n, *Rel. on.* [P 13 C 1]

(b) **Practice — Pleadings — Construction—Document should be construed as whole and not by few words, so also plaint.**

One must construe a document as a whole and should not confine himself only to a few words. In order to understand a relief sought in a suit one has to see the facts on which that relief is based. [F 13 C 2]

(c) **Hindu Law—Debts—No son has to pay father's debt unless he has inherited or has with him his father's assets—Pious duty of**

son to debts extends to assets from father only.

No son under any system of law is bound to pay the debt of his father unless he has inherited or has got in his hands the assets of the father. In this respect there is no difference between Hindu law and any other system of law. It is immaterial that the Hindu son had been benefited by the loan borrowed by the father. For a debt incurred by a manager or karta of a joint Hindu family within his authority, the co-parcenary property is liable provided that the debt was incurred for legal necessity of the family, or, at any rate, if the creditor made bona fide inquiries at the time of advancing the loan as to the existence of the necessity. The liability of a son is somewhat larger. Even if there be no legal necessity but the debt is not tainted with illegality or immorality, the son is bound to pay it up as it is his pious duty; but this pious duty to pay it is limited to the extent of the assets in his hands. There is no personal liability.

In order to make a person personally liable for a debt something more than mere benefit to him must be alleged and proved. For instance, it must be shown that he was a party to the contract of the loan or that he took upon himself its personal liability: *A. I. R.* 1931 *Pat.* 177 and *A. I. R.* 1931 *Pat.* 328, *Rel. on.* [P 14 C 1]

*K. Hasnain, Saiyid Mehdi Imam and Kali Prasad Sukul—*for Appellants.

*Shiveshwar Dayal and Kameshwar Dayal—*for Respondents.

Mohamad Noor, J.—This appeal arises out of an execution proceeding. The decree-holders had transactions with one Dwarka Prasad and for the money due from him took a hand-note. After the death of Dwarka Prasad they instituted a suit for the recovery of the amount against his son Udai Narain and Raghubir and Chote, the two minor sons of the latter. An ex parte decree was passed. Afterwards the defendants made an abortive attempt to get that decree set aside. The applications were dismissed for default. The decree-holders appellants now seek to execute the decree and realize it by attaching the salary of defendant 1 Udai Narain, who is in some Government service.

The simple question involved in this appeal is whether under the circumstances, which I have stated above, the decree-holders are entitled to execute the decree against defendant 1 personally. Both the Courts below have answered this in the negative. They have held in effect that the decree obtained against Udai Narain was in his representative capacity and cannot be executed against his person or personal property and the decree-holders must confine themselves

to the assets of the joint family which may be found in the hands of Udai Narain. The decree-holders have come up in second appeal and on their behalf Mr. Khurshaid Husnain has raised the following points.

His first contention is that the decree is in general terms and by it the defendants have been ordered to pay the decretal amount to the plaintiffs. No restriction has been placed in the decree as to the property from which the amount is to be realized. He argues therefore that the decree-holder is entitled to execute the decree against the person and such property of the judgment-debtor as he thinks fit. He further contends that the Courts below were not entitled to go behind the decree and investigate as to the basis of the claim on which the suit was based or the circumstances under which that decree was passed. The obvious answer to this contention is that it is the duty of the Court executing a decree to interpret it and to find out what the decree has really granted; and for this purpose the Courts are entitled to refer to the pleadings, and ascertain to what extent the decree can be executed. This was the view taken by a Division Bench of this Court in the case of *Ram Bujhawan Prasad Singh v. Ram Narayan* (1), a decision relied upon by both the Courts below. We sent for the records of that case, and it appears that the facts there were exactly similar to those of the present case. In that case also the debt was incurred by the father and on his death a suit was instituted against the son and decree was obtained against him, which was sought to be executed against his personal property. The decree as in the present case was in general terms. Jwala Prasad and Ross, JJ., held that the executing Court was entitled to look to the basis of the decree in order to execute it and held that only the co-parcenary property was liable for the satisfaction of a decree obtained against a son for the debt of a father. This view was based upon an unreported decision of the Calcutta High Court in *Kedar Nath Pal v. Amjed Paik* (2). Therefore I am of opinion that in order to find out whether a decree can be executed against a judgment-debtor personally, the Court must find out the basis of the

decree and for this purpose they are entitled to refer to the plaint of the suit.

The learned advocate has next placed before us a copy of the plaint written in Roman character and we had the whole of it read to us. No doubt in its prayer portion the plaintiffs asked for a decree against the person of defendant 1 and against the property of all the defendants (the other two defendants being the minor sons of defendant 1), but the suit was entirely on the basis of the liability of a joint Hindu family. The various paragraphs of the plaint clearly show that the claim was that the defendants and Dwarka Prasad formed a joint Hindu family and that the debt was incurred by the father of defendant 1 (Dwarka Prasad) as karta and muntazim (manager) of the joint Hindu family. Then the plaint asserts the pious obligation of the son to pay that debt. There was nowhere in the plaint any allegation on which it can be said that the plaintiffs based their suit upon a personal liability of defendant 1 or any fact from which one can infer that the plaintiffs' case was that on account of his being a party to the contract or by his subsequently ratifying it defendant 1 took the burden of the debt upon himself. Therefore by reading the plaint along with the prayer portion of it one is bound to come to the conclusion that the suit against the defendants was in their capacities as members of a joint Hindu family for a debt incurred by its late karta for the benefit of the family and the decree against them was in the same capacity and can only be executed as such. Mr. Khurshaid Husnain asks us to confine ourselves to the prayer portion of the plaint and leave aside the grounds on which that prayer was based. Obviously this is not the correct way of interpreting a document. One must construe a document as a whole and should not confine himself only to a few words. In my opinion in order to understand a relief sought in a suit one has to see the facts on which that relief is based. The next contention of the learned advocate is that even if the decree is taken to be in the representative capacity still defendant 1 as a son both under the Hindu law and also under the general law is bound to pay the debt incurred by his father. No authority has been placed before us for this wide proposition which the learned advocate advances. No son

(1) [1921] 2 P.L.T. 396.

(2) [1921] 25 C.W.N. 54n.

under any system of law is bound to pay the debt of his father unless he has inherited or has got in his hands the assets of the father. In this respect I do not think there is any difference between Hindu law and any system of law may it be Mahomedan law, or Christian law or any other law. A Hindu son is rather in an advantageous position. General law is that a debt incurred by a person is to be made good by his son or by any other heir up to the extent of the heritage which comes into his possession. A Hindu son has got this advantage : that he is not bound to pay the debt of his father out of the co-parcenary property if the debt is for illegal or immoral purposes. The learned advocate bases his argument upon the principle of benefit and contends that if a Hindu son is benefited by a debt incurred by the father, he is personally liable. I fail to understand what difference "benefit" makes in the case of a Hindu son ; and if he can be made liable on the principle of benefit why not also other sons governed by other systems of law. It will be too much to lay down that by simply getting some benefit from a debt incurred by a father a son is bound to pay it up and is personally liable to the extent of being sent to the Civil prison to satisfy it. As I have said no authority for this proposition has been placed before us.

It is settled law that for a debt incurred by a manager or karta of a joint Hindu family within his authority, the coparcenary property is liable provided that the debt was incurred for legal necessity of the family or, at any rate, if the creditor made bona fide inquiries at the time of advancing the loan as to the existence of the necessity. The liability of a son is somewhat larger. Even if there be no legal necessity but the debt is not tainted with illegality or immorality, the son is bound to pay it up as it is his pious duty ; but this pious duty to pay it is limited to the extent of the assets in his hands. There is no personal liability. This was the decision of this Court in the case of *Sukhdeo Prasad Narayan Singh v. Madhusudan Prasad Narayan Singh* (3) to which I was a party, and in the case of *Jwala Prasad v. Bhuda Ram* (4) to which my learned

brother Macpherson was a party. It is needless to refer to other decisions on the point. As I have said this is the settled law. In order to make a person personally liable for a debt something more than mere benefit to him must be alleged and proved. For instance it must be shown that he was a party to the contract of the loan or that he took upon himself its personal liability.

The learned advocate has relied upon S. 70, Contract Act, which runs thus :

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the things so done or delivered."

I fail to understand how this section applies to the facts of the present case. It was not the appellant's case in the plaint that the money covered by the hand-note was delivered to defendant 1 or that he received it. As I have already stated, the suit was based on the basis of the liability of the defendant not for his personal act, but as a member of the joint Hindu family of which his father was the karta; and therefore his liability must be determined on the basis of his legal position in that joint family.

The last contention of the learned advocate is that the decree being general in its terms and defendant 1 having acquiesced in that decree, i. e., he not having appealed against it and having allowed the application for setting it aside dismissed for default, has taken upon himself the responsibility of that decree and therefore he must pay it up. This, in my opinion, is the first point already dealt with put in another form. The question again is "is the decree a personal one?" If it is, according to the interpretation put upon it after referring to the pleadings, then certainly defendant 1 is liable whether he has acquiesced in it or not. But if, on the other hand, the decree against him as interpreted is not a personal one, I do not understand how it can become so by acquiescence. I do not think there is any force in this contention.

In my opinion the Courts below have rightly decided the case and the appeal must be dismissed with costs.

Macpherson, J.—I agree.

B.V./R.K.

Appeal dismissed.

(3) A.I.R. 1931 Pat. 177=132 I. C. 871=10 Pat. 305.

(4) A.I.R. 1931 Pat. 328=10 Pat. 503.

A. I. R. 1932 Patna 15**WORT AND FAZL ALI, JJ.***Gowa Petha*—Defendant—Appellant.

v.

N. H. Moos—Plaintiff—Respondent.

First Appeal No. 68 of 1929, Decided on 1st April 1931, against decision of Sub-Judge, Dhanbad, D/- 13th February 1929.

Civil P. C. (1908), O. 21, R. 49—Partnership—Assignee of one partner cannot sue other partners for accounts—Assignee obtaining decree against one of other partners and receiver appointed for share of judgment-debtor partner—Even such receiver cannot sue other partners for accounts but has only to receive profits of judgment-debtor partner.

An assignee of a share in partnership who has also obtained a decree against the partner cannot force the other partners to account by means of securing the appointment of a receiver especially when the partnership is subsisting. The receiver can only receive the profits as come to the share of the judgment-debtor partner and cannot get what the assignee himself cannot because an assignee of a partnership share cannot get accounts against the copartners. This is so because the relationship inter se between the partners being one of mutual confidence and fiduciary in its character, one partner cannot by merely transferring his interest in the partnership without the knowledge and consent of the other partners confer on the transferee all the rights and privileges which he himself possessed as a partner: (*Case law discussed.*) [P 18 C 1, 2; P 19 C 1]

Sultan Ahmed and S. C. Mazumdar—for Appellant.

Hasan Imam, K. N. Moitra and N. N. Roy—for Respondent.

Wort, J.—This is an appeal by the defendant in an action brought by a receiver appointed by the High Court, Bombay, claiming accounts against the defendant, one Gowa Petha. The action succeeded and an account has been ordered from the year 1921. One of the contentions by the defendant was that the action was barred by limitation. It was stated that Art. 89, Limitation Act, applied but it is quite obvious that what is called the residuary article, namely Art. 120, Limitation Act, applies, and in those circumstances from the facts which will presently appear I have no doubt that that plea fails.

The action in which the plaintiff receiver was appointed was one in which the plaintiffs were a firm known as Khimji Poonja & Co. carrying on business within the fort of Bombay and the defendants also were a firm known as Tricumji Jivandas, who also carried on business in Bombay.

The contention on behalf of the plaintiff was that the defendants Tricumji Jivandas and Gopaldas Tricumji were partners with the defendant in this action, Gowa Petha, in a colliery business carried on at Jharia. It appears that the plaintiffs in the Bombay action Khimji Poonja & Co., had given financial assistance to Tricumji Jivandas and that on 13th November 1923 Tricumji Jivandas had assigned, amongst other things, their interest amounting to one and a half annas in the coal mine in which they alleged they were partners.

A number of questions arose, and it was contended by the defendant before us that in the first place no action lay for accounts as the receiver had not, and indeed was not, in a position to ask for dissolution. That argument was based on the assumption that there was in fact a partnership between Tricumji Jivandas and Gowa Petha. But, as an alternative argument it was contended that there was no such partnership and that the most that could be said was that there was some form of partnership in a railway contract which Gowa Petha was working. Another matter that was argued was that, even assuming that there was a partnership between the parties, the receiver under the law was entitled only to such accounts as the partners Tricumji Jivandas cared to render and that the receiver could not call the other partners in the partnership to account. A number of other incidental matters were argued, amongst them being that the charge that was created by the decree in the Bombay action charged not the whole interest of Tricumji Jivandas in the partnership but only that of Gopaldas Tricumji who was the senior partner. It had better be stated at once that Tricumji Jivandas was the name of the father of Gopaldas who had died more than 40 years ago but that the business was carried on under his name, although the partners are now Gopaldas Tricumji and Morarji his nephew only.

It is rather remarkable that in the action in the High Court in Bombay the defendants were described as Gopaldas Tricumji, Deoji, who was the brother of Tricumji Jivandas, and thirdly, the firm Tricumji Jivandas. This is possibly explained by the fact that one of the signatories to the deed of assignment of 13th November 1923, was the same Deoji

although there was also a third Ranchhodas Tricumji. There are certain facts in the case which are quite clearly established and not denied. It is perhaps unnecessary to set out in detail the various deeds under which Gowa Petha acquired the colliery lands. But commencing from the year 1900 and ending in the year 1908, Gowa Petha had acquired some 300 bighas of colliery lands, 100 of which he conveyed to Manji Navaji and by another document in 1917 he conveyed 20 bighas to Tricumji Jivandas, that is to say at the time of this action he held only 180 bighas but during the earlier years of the alleged partnership the colliery lands consisted of 200 bighas.

On the question of partnership or no partnership, it is necessary to rely upon the evidence in the case as there is no deed which could be properly described as a deed of partnership between the firms.

Two points arise on this question, one whether there was a partnership as to the business only, and secondly, whether there was a partnership both as regards the business and the colliery lands. This is an important point as it is quite clear that the remedies of the plaintiff would be considerably affected according to the decision arrived at on this question. There are however a number of documents which are produced in evidence to prove the partnership, the first being an agreement dated 7th December 1904. That states (incidentally it is signed by Gowa Petha) that as regards the amount of 100 bighas of land in the Jharia coal field which the party of the other part (Gowa Petha) has managed in his name and the railway contract work undertaken in both the names, the party of the first part, that is Gopaldas Tricumji, has a share of one and a half annas. Then it is recited later that moneys have been drawn from Gopaldas for the aforesaid works and further each party has to invest moneys in the colliery according to his respective share and each party has to debit interest to the said colliery according to his respective share. There is a further provision by way of postscript which is to the effect that any moneys advanced in excess of the share shall bear interest. A further document of 22nd September 1906 recites the fact that Gowa Petha had taken money from Gopaldas, that the profit is to be divided

in accordance with the said books of account and in proportion to the shares. Then there is a provision as to the payment of certain sums advanced and the distribution is to be made in respect of the profits every year and that the profit is to be divided among all. There is still a further and important provision that the colliery is to be continued to be worked as joint concern.

It appears that Gowa Petha had certain subpartners and they appear to have been apprised of the arrangement between Gowa Petha and Gopaldas. The facts are very important on this question. The original sum advanced by Tricumji Jivandas to Gowa Petha was Rs. 5,000, and it is one of the contentions of the defendant that the arrangement between the parties was merely that in consideration of this advance Tricumji Jivandas should have an interest in the colliery business by way of a share of the profits. It must be agreed that if that is the arrangement then that was consistent with there being no partnership between the parties in the colliery business; but it appears to be negatived by the facts. The facts are that that sum of Rs. 5,000 was paid off in 1910, that accounts were rendered from time to time by Gowa Petha, that sums were paid on account of interest in the profits, and indeed it has been found, and not now disputed, that the last account so rendered was in the year 1921. That there was a partnership in the colliery business seems to me to be beyond doubt. I have said that Sir Sultan Ahmad, who argued the case on behalf of the appellant, stated that it was in the railway contract only, but the document upon which he relied namely, the first to which I have referred distinctly states that his interest is in the contract as well as in the colliery. The further question to be determined is whether there was a partnership in the colliery lands as well as in the colliery business. There is evidence on behalf of the plaintiff that there was such a partnership. The matters on which Mr. Hasan Imam on behalf of the plaintiff relies are first of all Ex. 4 which was a document between Gowa Petha and his subpartners in which he recites the fact that

"a writing in my name has already been made in any respect of the shares allotted to Tricumji Jivandas in the 100 bighas of land."

That was dated 1901 and at that time only 100 bighas of land were in the possession of Gowa Petha; it was not till 1908 that the other 200 bighas were acquired. I do not think that there can be any doubt that there was also a partnership in the colliery. But there is one point on this question which creates some difficulty.

On 18th December 1916, Gowa Petha conveyed to Gopaldas Tricumji 20 bighas of the remaining 200 bighas, and it is contended that that is wholly inconsistent with the partnership in the colliery lands. But it is pointed out by Mr. Hasan Imam that on 19th December there was an account prepared in the form of a receipt given to Tricumji Jivandas from which it appears that some six or seven thousand rupees were due from Gowa Petha on account of the distribution of profits and that the consideration money for these 20 bighas, namely Rs. 10,500 is placed on the other side of the account, that is to say, that the Rs. 10,500 went into the partnership accounts and not into the pocket of Gowa Petha. This transaction is somewhat difficult to explain. On the facts and circumstances of the case, I do not think however that there is any serious obstacle to the contention that there was a partnership in the colliery, as well as in the colliery business.

Sir Sultan Ahmad raises another question. He has stated that in any event an account in this case is impossible because all the partners in the partnership business are not before the Court. The answer of Mr. Hasan Imam is that in the judgment of the Bombay High Court and the decree prepared thereunder which makes a charge on the share of Gopaldas only, the parties were treating Gopaldas Tricumji as the firm. The senior partner was Gopaldas and in the deed of agreement of 7th December 1904, Gopaldas Tricumji Jivandas's firm was described as a firm carrying on business as also in the deed of 22nd September 1906, and that to all intents and purposes the parties, as I have stated, considered that Tricumji Jivandas and Gopaldas Tricumji were interchangeable names. That might be an explanation that the judgment and decree in the Bombay action was against Gopaldas Tricumji. But Sir Sultan Ahmad contends that there was a

compromised action and that all that the parties could do in the circumstances was to charge Gopaldas Tricumji's share. He suggests that the arrangement was a collusive one; but there is no evidence of that, and it seems to me that the explanation put forward by Mr. Hasan Imam on behalf of the respondent appears to be the correct one.

We are met however in this case with a much more serious obstacle in the way of the plaintiff. The partnership share which was being assigned is the share in the business and in the colliery: in other words, the partners are partners both as regards the profits and also in the mine itself. In those circumstances the partners are partners to all intents and purposes and their rights are governed by the ordinary law of partnership.

The exception to the rule that an assignee of a partnership share cannot get accounts against the co-partners is that of a case in which although the partners are partners in the profits of the mine, they are not co-partners in the mine itself but merely co-owners, and in those circumstances not only can they assign their share but obtain accounts against the co-partners; see *Bentley v. Bates* (1). The only section in the Contract Act which has any connexion with this matter is S. 253 which provides that a partner cannot be pressed upon the partnership without the consent of all parties and it is upon the basis of that principle that the rights and liabilities of an assignee of a share in the partnership are prescribed. We have in India no definite statutory provisions relating to the specific question before us, namely whether an assignee can claim an account by action against the partners. In England, before the Partnership Act of 1890, there was a difference of opinion and it was thought that the case of *Whetham v. Davey* (2) represented the view that an account could be had. There was authority however against the proposition, and indeed, when the case to which I have referred is examined it is seen that it is a case in which an account had been claimed after dissolution.

There is no dispute that after dissolution an assignee can claim an account

(1) [1840] 4 Y. & C. (Ex.) 182=9 L. J. (n. s.) Ex. Eq. 30=4 Jur. 552.

(2) [1885] 30 Ch. D. 574=33 W. R. 925=53 L. T. 501.

against the partners. By S. 31, Partnership Act, 1890, the better opinion as it was described in England was given statutory effect and under that section an assignee is entitled to receive a share of the profits to which the assigning partner would be entitled and the assignee must accept the accounts of profits agreed to by the partners and there is a direct prohibition against an assignee requiring any accounts of the partnership transactions or interfering in any way with the management or administration of the partnership. I do not think that there is any doubt that the better opinion, so called, which is now represented in England by S. 31, Partnership Act of England, represents the law in India, although there is no statutory provision to that effect, and for that reason alone I would hold that the plaintiff in this action is not entitled to succeed.

There are a number of subsidiary questions which it is unnecessary to determine having regard to my decision on the last point.

In my judgment the appeal should be allowed with costs.

Fazl Ali, J.—The principal question which seems to me to require decision in this appeal is whether the plaintiff is entitled to sue for accounts in the circumstances of the case. The question is not an easy one and I was first inclined to think that it should be answered in the affirmative. The facts which weighed with me were: (1) that the plaintiff having been appointed a receiver in respect of the right, title and interest of Tricumji Jivandas may well be regarded as being in a somewhat better position than the mere assignee of a share in a partnership, and (2) that by maintaining that there was no partnership between the defendant and Tricumji Jivandas and withholding their share of the profits of the business, the defendant has been virtually trying to exclude a partner from the partnership. It appears to me however on a fuller consideration of the matter that the view taken by my learned brother is correct.

It is well established that the relationship inter se between the partners being one of mutual confidence and fiduciary in its character, one partner cannot by merely transferring his interest in the partnership without the knowledge and

consent of the other partners confer on the transferee all the rights and privileges which he himself possessed as a partner. It is also well recognized that partners are not as regards partnership dealings considered as debtor and creditor inter se, until the concern is wound up or until there is a binding settlement of accounts. On these principles, it has been held that ordinarily a stranger to the partnership is not entitled to an account of the partnership and that the Court will not as a general rule order an account of partnership dealings even at the instance of a partner, unless he also claims dissolution or alleges that the partnership is dissolved. Both these rules however are subject to exceptions. For example, an account may be ordered without a claim for dissolution where a partner is trying to exclude his partner from some secret benefit from the partnership or to force him to a dissolution, or where there is a refusal to account, or where a limited account will meet the interest of justice of the case: see Halsbury's Laws of England, Vol. 22, p. 71. It was held by the Lahore High Court in *Harji Mal Mela Ram v. Kripa Ram Brij Lal* (3), that where a partner withholds the profits of the concern from a partner of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits and such a suit cannot be dismissed for the reason that the plaintiff does not claim a dissolution. Similarly in special circumstances strangers to the partnership have been held to be entitled to an account but, so far as I am aware, most of these cases are those where on the death or bankruptcy of one of the partners the legal personal representative of the deceased partner or a trustee in bankruptcy has been allowed to have an account against the other partners.

Turning now to the facts of the present case it will appear that Messrs. Khimji Poonja & Co., at whose instance the plaintiff was appointed a receiver by the Bombay High Court, had obtained a decree which declared that they had a valid charge upon the share of Gopaldas Tricumji (who from the evidence appears to be the managing partner of the firm of Tricumji Jivandas) in the colliery worked

(3) A. I. R. 1922 Lah. 195=66 L. C. 478=2 Lah. 351.

by Gowa Petha. Their position therefore virtually is that of a mortgagee whose charge has been declared upon the interest of one of the members of the partnership. The question which is to be considered is, what are the rights of such a person in the partnership. The Indian statute law nowhere defines the rights of an assignee or a mortgagee of a share in a partnership. In England however the rights of such persons are governed by S. 31, Partnership Act, 1890, which is as follows:

(1) "An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

The Courts in this country have often remarked that what has been laid down by this section may also be taken to represent the law in India: see *Chidambaram Chetty v. Karuthan Chetty* (4) and *Dhanaji Jhelaji v. Gulabchand Pana* (5) and it follows, therefore that as a general rule a mortgagee or an assignee cannot sue for accounts. In some cases however it has been held that where a partner disposes of his entire interest in the partnership by way of sale or where his interest is sold in an execution sale the partnership comes to an end under S. 254, Cl. (3), Contract Act, and therefore an assignee may sue for dissolution under S. 265, Contract Act, or sue for account upon the dissolution of the partnership: see *Juggut Chander Dutt v. Rada Nath Dhur* (6) and *Pervatheesam v. Bapanna* (7); see also S. 253, Cl. 7, Contract Act. On the other hand it was held in *Dhanaji Jhelaji v. Gulabchand Pana* (5) that an assignment by one of the partners in a

firm, of his share in the partnership does not cause an immediate dissolution of the partnership, nor does the assignment give the assignee a right to the account of the profits. It merely gives a right to the other partners to dissolve the partnership.

However that be, this is not a case in which the interest of one of the partners has been completely disposed of, and it is conceded that the position of Messrs. Khimji Poonja & Co. was merely that of a mortgagee or a charge holder. Upon general principles therefore such a person cannot in ordinary circumstances sue for accounts and a question arises as to whether he can, by securing the appointment of a receiver, do indirectly what the law does not entitle him to do directly. It has been urged before us on the one hand that the position of a receiver is better than that of a mere assignee, and, on the other, that it is even worse than that of the latter. However that may be, no authority has been placed before us to warrant the proposition that a receiver appointed at the instance of an assignee in circumstances such as those of the present case is entitled to sue for accounts where the assignee himself cannot do so. I may mention that it has also been pointed out on behalf of the appellant that, although evidence was adduced on behalf of the plaintiff to show that the firm of Tricumji Jivandas (or the persons who have chosen to describe themselves as such) were partners in the colliery business, what Messrs. Khimji Poonja & Co. prayed for in their plaint was that a charge may be declared only upon the share of Gopaldas Tricumji in the colliery. It was also pointed out in this connexion that Gopaldas Tricumji is only one of the partners in the firm of Tricumji Jivandas and there seems to be no apparent reason why Messrs. Khimji Poonja & Co. did not pray for a charge on the interest of Tricumji Jivandas in the colliery although the firm had been impleaded as a defendant in the suit. It is again pointed out that curiously enough, although by the decree passed by the Bombay High Court on 8th April 1924 it was declared that the plaintiffs had a valid charge upon defendant 1's share in the coal mine, that is to say, the share of Gopaldas Tricumji, yet the plaintiff has been appointed a receiver not only in respect of the right, title and interest of Gopaldas Tricumji but also in respect of the right, title and in-

(4) [1916] 34 I. C. 543.

(5) A. I. R. 1925 Bom. 347=87 I. C. 812.

(6) [1884] 10 Cal. 669.

(7) [1890] 13 Mad. 447.

terest of the firm of Tricumji Jivandas. There is no doubt that these facts somewhat complicate the position, but what chiefly weighs with me is that the plaintiff has not succeeded in showing why the present case should be taken out of the general rule that a partner should not be made liable to render account to a mere assignee or to a person who is a stranger to the partnership. I am somewhat fortified in this view when I find that a case like the present seems to be covered by a definite provision of law both in England and in India. In England S. 23, Partnership Act, provides that the High Court or a Judge thereof or a county Court, may on the application by summons of any judgment-creditor of a partner make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment-debt and interest thereon and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing) and of any other money which may be given to him in respect of the partnership and direct all accounts and inquiries and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment-creditor by the partner or which the circumstances of the case may require. This is also exactly what O. 21, R. 49, Civil P. C., provides.

Thus, under the latter rule it is possible for an assignee who has also become a decree-holder not only to secure the appointment of a receiver but also to obtain from the Court an order against the other partners directing accounts to be taken. It is to be noted that this rule does not suggest that the receiver who is appointed will be entitled to institute a suit for accounts, but what it seems to provide is that he will merely receive such profits as are actually paid out of the partnership and as will, but for his appointment go into the hands of the judgment-debtor partner. As to the accounts, sub-R. (2) makes it clear that it will be ordered only after the application of the decree-holder is served on the judgment-debtor as well as his partners or such of them as are within British India. Thus, if any account is to be taken, it will be taken in the presence of all the partners, including the judgment-

debtor, as should be done whenever an account is ordered to be taken in respect of the partnership business. It is true that, as was held in *Brown Janson & Co. v. Hutchinson & Co.* (8) the Court will order accounts only under special circumstances, but I do not think there would be any difficulty in the Court ordering accounts to be taken where there is evidence that one of the partners is trying to exclude his partner from the partnership or where there is evidence of a refusal to account.

Now, in the face of this definite provision, I do not think it could have been intended that an assignee of a share in partnership who has also obtained a decree against the partner instead of having recourse to this provision should force the other partners to account by means of securing the appointment of a receiver especially when the partnership is still subsisting and the partnership has not been dissolved. It is needless to say that the present suit is only for account and not for dissolution and accounts, a suit which could have been brought by the partner himself only under special circumstances. I think therefore that the present suit is entirely misconceived and as such liable to be dismissed.

I may here incidentally point out that it was held in *Jagat Chunder Roy v. Iswar Chunder Roy* (9), that the share of a partner in a partnership business is a saleable property and can therefore be attached and sold in execution of a decree by a creditor against that partner. In concluding the judgment of that case the learned Judges who decided that case observed:

"In the present case the partnership is apparently still subsisting and we think that the decree-holder is entitled to attach the partnership property If the decree is not satisfied he may proceed to put up to sale the two annas share in the partnership business which it is alleged belongs to his judgment-debtor. If any such sale takes place it will then be open to the purchaser or to the other partners to apply to have the partnership wound up and an account stated."

This case was decided before O. 21, R. 49 was enacted, but I take it that what has been laid down there is still good law (with the exception perhaps of the remarks relating to the attachment of partnership property as distinct from

(8) [1895] 2 Q. B. 126=64 L. J. Q. B. 619=43 W. R. 545=73 L. T. S.

(9) [1893] 20 Cal. 693.

the right, title and interest of the individual partner against whom a decree may have been obtained) and indicates one of the courses open to the creditor who has obtained a decree against one of the partners in the partnership.

I do not think I can usefully add to the judgment of my learned brother on the questions of fact which have been decided by him in favour of the plaintiff, and I shall only say here that I entirely agree with his conclusions. I, therefore concur in the order proposed by him that this appeal should be allowed with costs.

B.V./R.K.

Appeal allowed.

A. I. R. 1932 Patna 21

WORT AND MOHAMAD NUR, JJ.

Pirthvi Chand Lal—Plaintiff—Appellant.

v.

Kirtyanand Singh and others—Defendants—Respondents.

Second Appeals Nos. 1669 and 1670 of 1928, Decided on 13th March 1931, against decision of District Judge, Monghyr, D/- 20th September 1928.

(a) Bengal Land Revenue Sales Act (1859), Ss. 3 and 5 — Under S. 3, Board of Revenue fixes date generally — Under S. 5 Collector fixes another date—S. 5 is exception to S. 3.

Under S. 3 Board of Revenue fixes the dates on which the arrears of revenue shall be paid up, in default of which payment, the estates in arrears shall be sold at public auction. S. 3 empowers the Board of Revenue to fix latest day of payment for the arrears fallen due under S. 2. S. 5 is a proviso to S. 3. S. 5 uses the words "latest date" in respect of the date to be fixed by the Collector, on which payment shall be received. The dates in S. 3 and S. 5 are not the same. When the Collector exercises his powers under S. 5 and fixes a later date for the receipt of the arrears, the day fixed by him becomes the latest day of payment in supersession of the general latest dates of payment fixed by the Board of Revenue under S. 3. As long as the latest date is not fixed by the Collector, the general date fixed by the Board remains in force: (*Case law discussed*).

[P 29 C 1, 2 ; P 30 C 1]

(b) Bengal Land Revenue Sales Act (1859), S. 33 — Irregularity or illegality does not vitiate sale unless pleaded.

No amount of irregularity or illegality will vitiate a sale unless the grounds are specifically taken in an appeal to the Commissioner presented under S. 33 of the Act. [P 26 C 1]

(c) Bengal Land Revenue Sales Act (1859), S. 33—Collector selling estate without there

being arrears—Such sale is ultra vires—Civil Court can set it aside.

If the Collector sells an estate without there being an arrear his act is ultra vires and without jurisdiction and the provision of Revenue Sales Act has no application to such a sale and the civil Courts can set it aside on the ground of want of jurisdiction and the suit is not barred by the provision of S. 33 of the Act: 25 Cal. 833 and 31 I. C. 965, *Ref.* [P 26 C 1]

(d) Bengal Land Revenue Sales Act (1859), S. 3—Collector's jurisdiction to sell estate commences after arrears remain unpaid on latest day of payment.

The jurisdiction of the Collector to sell the estate in arrears does not arise till the arrears remain unpaid on the latest day of payment fixed under the law for the payment of those arrears: (*Case law discussed*). [P 28 C 2]

(e) Execution—Appointment of receiver by Court to manage estate—It is tantamount to attachment by Court—Receiver.

When the Court appoints a receiver and thereby takes charge of the property and manages through an officer appointed by it the position becomes stronger than that of an ordinary attachment in execution of a decree and is an attachment by the civil Court. [P 30 C 1]

S. M. Mullick and A. H. Fakhruddin—for Appellant.

C. C. Das, D. L. Nandkeolyar and K. N. Moitra—for Respondents.

Wort, J.—This is an appeal of the plaintiff from the decision of the learned District Judge of Monghyr in an action which was brought to set aside a sale under Act 11 of 1859. The property consisted of Tauzi No. 2480-1 in Mahal Amanatpur representing 5 annas 6 gandas share and Tauzi No. 2480 representing 2 annas 13 gandas share in the same mahal. The property originally was that of the Srinagar Raj but the plaintiff had purchased it in execution of two mortgage decrees. The defendants are the Banaili Raj and purchased them in the sale of 7th January 1924. The case for the plaintiff was that he was unaware of the sale until March 1924.

The facts so far as they are relevant are these: the dates which have been fixed under S. 3 of the Act 11 of 1859 were

First kist	...	7th June.
Second kist	...	28th September.
Third kist	...	12th January.
Fourth kist	...	28th March.

It is admitted and indeed it is quite clear from the record of the case that the kist dates fixed under S. 2 of the Act

are unknown. The kist due on 7th June for Tauzi No. 2480-1 was Rs.33-10-0 and for September Rs. 44-13-0 and the kist for 7th June for Rs. 2480 was Rs. 16-1-0 and for September Rs.23-9. In both cases the sums payable on 7th June were remitted on 6th June and were received on 9th June. Those payable on 28th September were remitted on 25th September and reached the Collectorate on 26th September. It is obvious therefore that those payable on 7th June were two days late but those payable in September were received before the due date. The sale was held with a notice issued under S. 5, Act 11 of 1859 fixing the date under that section as 28th September kist treating the estate to be in arrear.

Some argument was addressed to us on the question of whether the sale was held for 7th June kist so called or 28th September, but I think it is quite clear from the record that the sale purported to be held for the September kist and that it cannot be said in the circumstances that the Collector was entitled under the Act to sell by reason of the omission to pay the June kist by 7th June; for this reason a notice was issued under S. 5 of the Act under which the date given for payment of arrears was 28th September. It is argued therefore that all payments due were in fact made before that date. It was faintly argued that the sums paid were not accepted as against the sums due but were placed on deposit in the Collectorate. I do not think this argument can prevail but that if the payments were received the Collector had no other course open to him than to credit the sums paid against the sums due. But the main contention by Mr. C. C. Das was this that the case did not come under S. 5 at all as the property was not under attachment and that no notice under S. 5 was required and the only question which the Court could look into was whether there were arrears within the meaning of S. 2, that knowing as we do the dates, 7th June and 28th September were the last dates fixed by the Board of Revenue under S. 3, there must have been in fact and in law arrears within the meaning of S. 2. He further argued that it mattered not whether the Collector has sold in contravention of his notice under S. 5 but the very existence of the arrears gave him jurisdiction and

his non-compliance with his own notice under S. 5 was a mere illegality or irregularity. Further points arise out of this argument and I shall make reference to them later, but as it will be seen the argument depends to some extent on whether the property was under attachment or not. There is a good deal to be said in favour of the view that the property was not under attachment but this involves a question of fact and as all the Courts below have proceeded on the view that it was property covered by S. 5 I do not think that we at this stage can question that matter more especially as no party has raised this question before the case came before this Court. I am therefore of the view that it is a case under S. 5 and the question which arises must be decided accordingly.

For the appellant it is argued (and this is the only point now relied upon) that there were no arrears and that therefore the Collector had no jurisdiction.

Now let me reiterate. The date fixed was the latest date on which payment should be received failing which payment the Collector had jurisdiction to sell. Mr. Sushil Madhab Mullick's argument in substance is this that the matter is one of jurisdiction: that the Collector had no jurisdiction to sell if in fact the arrears were paid up before 28th September and that it is quite clear in this case that they were so paid. I should have mentioned that an application was made to set aside the sale and an appeal was filed before the Commissioner but was out of time and it is contended by Mr. C. C. Das that as the grounds which are now advanced have not been specified in the appeal before the Commissioner under S. 25, the civil Court had no jurisdiction to set aside the sale (S. 33, Act 11 of 1859). In answer to this point Mr. Sushil Madhab Mullick reiterates his argument that as this is a matter of jurisdiction, there is no such prohibition as Mr. Das contends for. I think it is now well established that if there were in fact or law no arrears there was no jurisdiction in the Collector to sell.

In order to decide the case it is necessary to see what the proper construction of Ss. 3 and 5 of the Act are. S. 3, as I have stated, is the section which makes an estate liable for sale. In other

words, as a condition precedent to sell, there must be a default in payment by the date fixed under S. 3 (which fixes the date upon which all arrears are to be paid). The contention of Mr. Sushil Madhab Mullick is that the Collector having issued his notice under S. 5 it has the effect of extending the date given under S. 3. In other words S. 3 gives jurisdiction to the Collector after the date therein fixed. S. 5 is an exception to S. 3 and has the effect of fixing another date other than that fixed by the Board of Revenue under S. 3 in those cases which are contemplated by S. 5 and that this is one of such cases.

Now a number of authorities have been relied upon, but it seems to me that the only case from which the respondent can get any real assistance is the judgment of the Privy Council in the case of *Govind Lal Roy v. Ramjanam Misser* (1). That was a case in which the property being an estate under attachment by the Board of Revenue was sold in contravention of S. 17, Act 11 of 1859. That section provides that no estate shall be liable to sale for the recovery of arrears which have accrued during the period of its being under the management of the Court of Wards, and no estate, the sole property of a minor or minors, etc., shall be sold for arrears of revenue accruing subsequently to his or their succession. And no estate held under attachment by the revenue authorities, otherwise than by an order of a judicial authority, shall be liable for sale of arrears accruing whilst it was so held under attachment, etc. Lord Macnaghten delivering the judgment of their Lordships, of the Privy Council stated thus :

"Giving however full weight to these considerations, their Lordships, having regard to the scheme of the Act and the express direction contained in S. 33, are of opinion that in every case where a sale for arrears of revenue is impeached as being "contrary to the provisions" of Act 11 of 1859 no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner."

He further adds :

"In the opinion of their Lordships a sale is a sale made under the Act 11 of 1859 within the meaning of that Act when it is a sale for arrears of Government revenue, held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act, either by reasons of some irregularity in publishing or conducting the

sale, or in consequence of some express provision for exemption having been directly contravened."

And later he says :

"It is difficult to suppose that the introduction of that sentence into the Act of 1859 (the sentence being under S. 33, "and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of) could have been intended to have the effect of excluding from S. 33 all cases of illegality as distinguished from irregularity,"

and then Lord Macnaghten adds that it would have been most unfortunate if their Lordships had to construe the Act as it had been heretofore construed in India having regard to certain considerations he therein mentions.

Now it is perfectly clear from the passage to which I have made reference that the Judicial Committee of the Privy Council places cases of illegality on the same basis as mere irregularity. Now it is contended by Mr. C. C. Das that what gives the Collector jurisdiction to sell is not the dates which are fixed by the Board of Revenue under S. 3 or extended in effect by S. 5 in those cases which come under that section, but merely the existence of arrears under S. 2. On the other hand it is contended that what gives the Collector jurisdiction to sell is noncompliance by nonpayment by the date fixed under S. 3 and if in fact there is a payment by that date there are no arrears and consequently the Collector has no power to sell, in other words, that S. 3 in one class of case and S. 5 in another class has the effect of extending the date. For the purpose of this argument I am treating S. 5 as a mere exception to S. 3 and I think that must be so and for this reason. S. 3 fixes a date generally, under S. 5 there is another date fixed.

I therefore think that it is correct that S. 5 is an exception to S. 3. Therefore the case must be decided on that basis.

Now to revert. The argument as I said, was that this was not a question of arrears under S. 2, but whether the payment has been made by the date fixed under S. 3 or S. 5 has been complied with or not; that gives jurisdiction. S. 3 says :

"Shall be paid up in each district in default of which payment the estate in arrear in those districts shall be sold at public auction."

I have left out the words in the section which are unnecessary for the pur-

(1) [1894] 21 Cal. 70=20 I. A. 165 (P.C.).

pose of this argument. It is argued therefore that the Court had no jurisdiction. It was illegal to sell before the date fixed under S. 3 or as in this case under S. 5.

Now let us look to S. 17 which was the subject of the case to which I have referred. No estate held under attachment by the revenue authorities shall be liable to sale for arrears accruing whilst it was so held under attachment. There is a direct prohibition under that section and S. 3 says default may result. It seems to me quite immaterial whether the section is worded by way of prohibition as S. 17 or whether it be worded in the manner of S. 3 which definitely gives jurisdiction in certain cases. Indeed when there is a direct prohibition I think this might be said that no jurisdiction can exist which is in defiance of that prohibition and to that extent a case under S. 17 is on stronger ground in favour of the argument advanced by the respondent than a case under S. 3 or under S. 5. Lord Macnaghten has dealt with the prohibition in S. 17 as an illegality; it cannot be questioned in the civil Courts unless S. 33 has been complied with. Personally I cannot see how the case coming under S. 3 or S. 5 can be in any better position for the purpose of setting aside the sale than a case coming under S. 17. It is argued that if it is S. 3 or S. 5 which gives jurisdiction and not the existence of arrears as defined under S. 2, it is difficult to see why the legislature enacted S. 2. The reason is clear, it is argued, i. e., to create jurisdiction in the Collector to sell. If that is not correct it seems to me that that section is redundant. Arrears exist in the ordinary acceptation of the term when a payment is not made on its due date and it would have been sufficient for the legislature to have fixed latest days of payments under S. 3 and S. 5 as it has done.

There is a great deal to support this argument, and in the judgment of Das, J., in the case of *Jagdishwar Narayan v. Muhammad Haziq Hussain* (2) it was held that a sale before the last day fixed for payment under S. 3 was a mere illegality and that that was insufficient to set aside the sale and that case of *Govind Lal Roy v. Ramjanam*

Missir (1) was relied upon. It is true that from some points of view the opinion expressed was unnecessary for the point which was actually to be decided, and when the case went before the Judicial Committee of the Privy Council in *Jagdishwar Narayan v. Muhammad Haziq Hussain* (3) the view expressed by Das, J., on this point was not referred to. In the judgment of Kulwant Sahay, J., in *Shama Kant Lal v. Kashi Nath Singh* (4) the judgment of Newbould, J., in the case of *Amrita Lal Roy v. Secy. of State* (5) was referred to. The passage in Newbould, J.'s judgment referred to was in the following terms :

"The liability of an estate to sale under the Act depends on three dates The estate is not liable for sale under the Act unless the arrear of revenue remains unpaid on the latest date as fixed under S. 3."

This passage of the judgment was relied upon by the appellant, but it seems to me that the matter is concluded by the case of *Haji Buksh Ilahi v. Durlav Chandra Kar* (6) before the Judicial Committee of the Privy Council. The facts of the case so far as they are relevant are these. The appellant's predecessor-in-title executed a kabuliyat in 1874 in which he undertook to pay a jama in the Collectorate within 28th June of every year. The holdings were Government tenures which came under Act 11 of 1859. The estate fell into arrears and was sold on 16th March 1903, to the respondent. Lord Shaw in delivering the judgment of the Board referred to S. 2, Act 11 of 1859 and stated that the date when by statute the revenue was considered in arrear was 1st July 1902. And then he proceeded to ask the question, at what date was the default made in paying the arrears of revenue so as to entitle a sale of the estate to be made. He proceeds to say that the answer sufficiently appears from the statute itself, and then proceeds to set out the provisions of S. 3 of the Act, under which the Board of Revenue is to determine upon what dates arrears of revenue shall be paid up, in default of which payment the estates in arrears

(3) A. I. R. 1926 P. C. 126=98 I. C. 920=53 I. A. 246=6 Pat. 200 (P.C.).

(4) A. I. R. 1926 Pat. 549=96 I. C. 807.

(5) [1918] 46 I. C. 447.

(6) [1912] 39 Cal. 981=16 I. C. 821=39 I. A. 177 (P.C.).

(2) A. I. R. 1924 Pat. 537=77 I. C. 851.

shall be sold at public auction. The date fixed under the Act was 28th June each respective year. It was then stated that the date on which payment of the arrears of 1902 was to be made must be 28th June 1903. Their Lordships then go on to hold that a sale prior to that date, namely, on 16th March 1903, was without jurisdiction. In this case before us 28th September was the date fixed. It is true that so far as the June instalment was concerned the payment was made a day or two after, but the September instalment was paid two days before 28th September. As 28th September was the date fixed under S. 5 it is obvious that there were in fact no arrears on that date. Therefore it seems to me, on the authority of the case which I have just referred to, that the sale was without jurisdiction. There is further the recent case of *Saraswati Bahuria v. Suraj Narain Chaudhury* (7) in which their Lordships decided that a sale before the date fixed as the last date of payment under S. 3 was without jurisdiction.

The result is that the appeal must be allowed with costs throughout.

Mohamad Nur, J. — These two second appeals arise out of two suits instituted by the plaintiff-appellants for setting aside sales held under Revenue Sale Law (Act 11 of 1859). The trial Court decreed the suits and set aside the sales, but on appeal the learned District Judge of Monghyr reversed the decree and dismissed the suits. The facts are these: Estate Amanat Sarkar Tauzis Nos. 2480 and 2480-1 belonged to Srinagar Raj and were purchased by the plaintiffs in execution of a mortgage decree in February 1922. Estate No. 2480 is of 2 annas 13 gandas share and No. 2480-1 of 5 annas 6 gandas. The latest days of payment of revenue for these two estates as prescribed by the Board of Revenue under S. 3 of the Revenue Sales Law are 7th June, 28th September, 12th January and 28th March. In the present suit we are concerned with the first two dates only. The amount, the latest date of payment of which was 7th June 1923 was Rupees 16.13.0 for Tauzi No. 2480, and Rupees 33.10.0 for Tauzi No. 2480-1 and the respective amounts for the two estates, the

latest date of payment of which was 28th September 1923, was Rs. 23.9-0 and Rs. 44.13-0. The plaintiff who is a resident of Purnea sent the amounts, the latest day of payment of which was 7th June 1923, by money orders which were received two days late, that is, on 9th June 1923. They were not credited to the accounts of the two estates, but kept in what the learned District Judge says "revenue deposit." It appears that a receiver was appointed by the civil Court and placed in charge of the Srinagar estate and his name was recorded in the Collectorate registers. The authorities therefore treated these estates as coming under Exception thirdly of S. 5 of the Revenue Sale Law and before proceeding to sell them for the defaults on 7th June proceeded under that section and issued notices asking payments of the amounts of which the latest day of payment was 7th June and 28th September 1923, by 28th September 1923. The amount for which the latest day of payment in respect of the two estates was 28th September 1923, were again sent by money order and were actually received on 26th September 1923, two days before the date of payment fixed.

It is apparent that the Tauzi Department of the Monghyr Collectorate ignored the money which had been received in respect of the two estates on 9th June 1923, and treating the estates to be in arrears for default of payments of the amounts the latest day of payment of which was the 7th June proceeded to sell them and they were sold on 7th January 1924. The plaintiff preferred appeals to the Commissioner long after the prescribed period and they were rejected as being out of time. I ought to have mentioned that in the notices issued by the Collector under S. 5, Revenue Sales Act, which are Exs. E and E-1 in the case the amount required to be paid was incorrectly mentioned. It is unnecessary to discuss it as it is an admitted fact and it is clear from the Tauzi ledger of the two estates that the amounts payable were what I have indicated above and that the amount mentioned in Exs. E and E-1 are incorrect. The facts which I have enumerated above are all admitted. After the rejection of the appeals by the Divisional Commissioner, the plaintiffs have instituted these suits for setting aside the sale. It is unneces-

(7) A. I. R. 1931 P. C. 57=130 I. C. 676=10 Pat. 496 (P.C.).

sary to discuss the various grounds urged in the plaint as first of all it is a settled law that no amount of irregularity or illegality will vitiate a sale unless the grounds are specifically taken in an appeal to the Commissioner presented under S. 33, Revenue Sales Act, and secondly, any defect in the service of notices, etc., are cured by the provision of S. 8, Act 7 of 1868 (B. C.). In this case it is clear that the appeal by the plaintiffs to the Commissioner being out of time was no appeal in the eye of the law and that sale certificates having been granted the illegality or irregularity, if any, in publishing of the notices etc., cannot now be gone into by the civil Court. The learned advocate for the appellant has urged one and one ground only, namely, that the estates were not in arrears. It is again a settled law that if the Collector sells an estate without there being an arrear his act is ultra vires and without jurisdiction and the provision of Revenue Sales Act has no application to such a sale and the civil Courts can set it aside on the ground of want of jurisdiction and the suit is not barred either by the provision of S. 33, Revenue Sales Act, or by the provisions of S. 8, Act 7 of 1868 (B. C.): vide *Balkishen Das v. Simpson* (8) and *Krishna Dayal Gir v. Irshad Ali Khan* (9) and the cases cited therein. Mr. C. C. Das who appears for the respondent has conceded that if it can be shown in the present suits that the Collector held the sale without there being an arrear his act was ultra vires and without jurisdiction and the plaintiff is entitled to succeed. I therefore proceed to consider whether or not there was an arrear in the present case. In order to find out what is an arrear and when the Collector's jurisdiction to proceed to sell commences, it is necessary to decide on what particular date an arrear standing against an estate gives the Collector jurisdiction to sell it. I would therefore deal with the scheme of the Revenue Sales Act. S. 2 of the Act defines an arrear. It says that:

"If the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistbandi of any mahal have been regulated be unpaid on the first of the following month of such era, the

sum so remaining unpaid shall be considered an arrear of revenue."

Therefore if one can find the various instalments fixed for a particular estate the amount of any instalment remaining unpaid on the 1st day of the next month becomes an arrear. In this case there is no evidence on the record to show what was the instalment or kist fixed for the payment of the land revenue of these particular estates. Therefore it cannot be decided how much money became an arrear on the first day of any particular month. S. 3 then empowers the Board of Revenue to fix latest day of payment for the arrears which had already fallen due under the provisions of S. 2. It is to be noted that this latest day is in common language spoken of as the kist day, that is, the day on which the instalment of revenue becomes due. In fact it is not so. It is the latest day for payment of an instalment which had already become an arrear. The question has been very elaborately dealt with by Kulwant Sahay, J. in *Shama Kant Lal v. Kashi Nath Singh* (4) and *Amrit Lal Roy v. Secy. of State* (5) and has been appreciated by the learned District Judge in these suits. He says as follows:

"In the Revenue Sales Law there are three vital dates to be considered in a case like this. The first is what may be called the kist date, that is, the actual date contracted for payment of an instalment of revenue in the original settlement papers. In the present case those papers are not before the Court and it is not possible to say with absolute certainty what those dates are. The second day is what may be called the arrear date, that is the first of the month next following the kist date. On this date the instalment of kist if still unpaid becomes an arrear: S. 2, Act 11 of 1859. The third is the latest day of payment fixed by the Board of Revenue under S. 3 after which an arrear still unpaid renders the estate liable to sale."

These are taken practically from the remarks of Newbould, J., in the Calcutta High Court case referred to above. The learned District Judge proceeds:

"The word 'kist' here however does not mean the instalment of revenue or date fixed for payment thereof in the settlement contract. The Board's Tauzi Manual defines kist as the period between one latest day of payment on which such a period expires.

The contention of the plaintiff in the plaint was that the 7th June and 28th September being the kist days, that is, the days on which the instalments were payable the amounts did not become arrears till after 1st July and 1st October 1923, and money having been received on 9th

(8) [1898] 25 Cal. 832=25 I. A. 151=7 Sar. 363 (P. C.).

(9) [1915] 31 I. C. 965.

June in one case and 26th September in the other the estates were not in arrear. No doubt there are some cases which support the contention of the plaintiffs that the kist days mentioned above are the real instalment days and that the amounts payable on those dates do not become arrears till the first of the next month. This seems to be the view taken by their Lordships of the Privy Council in the case of *Haji Buksh Ilahi v. Durlav Chandra Kar* (6) and a recent decision of their Lordships on an appeal from this Court *Saraswati Bahuria v. Suraj Narayan Choudhury* (7). In the first of these two cases there was an original kistbandi before the Court and it is not clear whether it was not so in the second case. Such a view however is in direct conflict with the judgment of Das, J. in *Jagdishwar Narayan v. Muhammad Haziq Hussain* (2) which was affirmed by the Privy Council *Jagdishwar Narayan v. Muhammad Haziq Hussain* (3). I therefore do not propose to decide this case on this basis. If however the plaintiffs' contention is sound there is no doubt that the sale is ultra vires, because the amounts due were in each case paid before they became arrears. I shall deal with the above two cases later on in another connexion. Therefore, so far as the present case is concerned, there is no evidence of instalment fixed for these estates.

I shall take it that the amount fixed for payment on the 7th June and 28th September, in respect of the two estates are really the amounts which became arrear prior to these two dates, and that these two dates are the latest dates for the payment of such arrears and in the rest of this judgment whenever I use the kist day or kist it means the latest day for the payment of the arrear already fallen due and the amount of such an arrear respectively. The learned advocate for the respondent contends that if an estate is in arrear and the Collector proceeds to sell it even before the latest day for payment has arrived his act is within his jurisdiction; and however illegal or irregular this may be, the sale cannot be set aside unless the requirements of S. 33, Revenue Sales Act, has been complied with. I am unable to uphold this contention. No authority has been placed before us for this very wide proposition. The learned advocate relies

on the observation of Das, J., in the case of *Jagdishwar Narayan v. Muhammad Haziq Hussain* (2). In that case the first Court had set aside the sale on two grounds: first of them was that he took the latest day of payment to be the instalment day and held that the amount of kist payable on the latest day fixed by the Board of Revenue did not become an arrear till the first of the succeeding month. Das, J., held that that view of law was erroneous. Then he proceeds and observes that if that view of law is incorrect, in his opinion, the Collector is empowered to sell even before the latest date of payment on the ground that an arrear had already accrued. This remark is relied upon by the learned advocate for the respondent. I shall deal with this later on. Ground 2 on which the first Court had set aside the sale was that in the notices issued under S. 6, Revenue Sales Act, certain properties included in the estate were left out, and relying upon the Full Bench decision of *Krishna Dayal Gir v. Abdul Gaffar* (10) he held that this omission was fatal as affecting the jurisdiction and the sale was null and void. Das, J., (Macpherson, J. concurring) though disagreeing with this view felt bound to follow the Full Bench case and dismissed the appeal.

This case went up to the Privy Council and their Lordships in fact overruled the Full Bench case and upheld the view of Das, J., on this point with the result that the sale was upheld: vide *Jagdishwar Narayan v. Muhammad Haziq Hussain* (3). Their Lordships held that the omission to include any property from notifications issued under the Act did not affect jurisdiction. There is nothing in the judgment of their Lordships of the Privy Council about the observation of Das, J., expressing his opinion that the Collector can proceed to sell the estate in arrear even before the latest date of payment has arrived. The observations were unnecessary for the decision of the case and were outside its facts. This was an obiter dictum and not binding upon us; and for the reason which I shall presently give I beg to differ from it with respect. S. 3, Revenue Sales Act, is explicit on the point. It says:

(10) [1917] 2 Pat. L.J. 402=40 I.C. 13 (F.B.).

"Upon the promulgation of this Act, the Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts shall be sold at public auction to the highest bidder."

It is clear that the liability of the estate to be sold arises not on the estate being in arrears but on the arrears remaining unpaid on the latest dates fixed. Then S. 6 provides that

"The Collector or other officer duly authorized to hold sales under this Act shall, as soon as possible after the latest day of payment fixed in the manner prescribed in S. 3 of this Act, issue notification in the language of the district etc."

The power of the Collector therefore to proceed to sell commences after the latest day of payment and not upon the accrual of the arrears and the last clause of S. 6 says that no payment or tender of payment, made after sunset of the said latest day of payment, shall bar or interfere with the sale, either at the time of sale or after its conclusion. This also shows that payment on or before the latest day bars the sale. S. 3 is the only section which makes an estate liable to sale and it does so if the arrears remains unpaid after the latest day fixed. This is the only section which gives the jurisdiction and that after sunset of the latest day. It may be argued that *Govind Lal Roy v. Ramjanam Misser* (1) by implication holds otherwise. S. 17 of the Act prohibits the sale under certain circumstances and their Lordships have held that disregard of this prohibition does not affect jurisdiction. But it is not so. S. 3 of the Act gives jurisdiction. S. 17 prohibits the exercise of that jurisdiction under certain circumstances. Want of jurisdiction is one thing and disregard of prohibition after the commencement of jurisdiction is another, and I have already said that the jurisdiction commences after the arrears remain unpaid on the latest day of payment. This view is supported by the remarks of Kulwant Sahay, J., in the case of *Shama Kant Lal v. Kashi Nath Singh* (4) and of Das, J. at p. 741 (of 6 P. L. T.) of *Suraj Narain Chowdhury v. Saraswati Bahuria* (11). This view is the ratio decidendi of the decision of their Lordships of the Privy Council in *Haji Baksh Ilahi v. Durlav Chandra Kar* (6). In this case

the sale was of a holding governed by Act 11 of 1859. The rent (or revenue) was payable on 28th June 1901, and according to S. 2 of the Act became an arrear on 1st July of that year but the sale was held on 16th March 1903. Their Lordships observed :

"The date when by statute accordingly this revenue was considered in arrear was 1st July, 1902. At what date was default made in paying that arrear of revenue, so as to entitle a sale of the estate to be made? This, which appears to their Lordships to be the real question in the case, is clearly answered by the Act of 1859 itself and by the notification which followed thereon. By S. 3 of the Act: "The Board of Revenue at Calcutta . . . shall be sold at public auction to the higher bidder." "

Their Lordships quote S. 3 of the Act :

"Bearing in mind that the whole provisions with regard to sales are, in the language of Lord Watson, 'framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty,' and that this tenure could not be considered in arrear until 1st July 1902, it appears fairly clear that 28th June 1903, is the first date under the proclamation and the statute when there has arisen such a default as would enable that "tenure in arrears" to be sold. . . . The statute having by plain implication forbidden the estate to be considered in arrear until 1st July, it appears to follow that the date fixed as that on which tenures in arrear will be sold must be the succeeding 28th June, namely, in the year 1903. This estate however was sold in the previous month of March, and their Lordships agree with the view of the Subordinate Judge in thinking that the sale is accordingly invalid Their Lordships agree with the view that the notification must, having regard to this section of the statute which authorized it, be applied to the present estate as fixing 28th June 1903, as the date on which if the arrears are not paid up, the estate can be sold."

Exactly the same view has been taken in a recent decision of the Privy Council, *Saraswati Bahuria v. Suraj Narayan Chowdhury* (7). It is therefore clear from the above decision that the jurisdiction of the Collector to sell the estate in arrear does not arise till the arrears remain unpaid on the latest day of payment fixed under the law for the payment of that arrear. Similar view has been expressed in the Calcutta decision *Harkhu Singh v. Bansidhar Singh* (12) at p. 361. Their Lordships' remarks are as follows :

"It would follow that as the March kist did not become in arrear until 1st April, the property could not be sold in respect of it unless default had continued until 28th June, which was the next fixed date after that instalment became an arrear."

(11) A.I.R. 1925 Pat. 750=88 I.C. 485.

(12) [1898] 25 Cal. 876=2 C.W.N. 360.

In this case their Lordships held that a suit to set aside a sale purporting to be under Act 11 of 1859 on the ground that arrear of revenue was not due may be brought in the civil Court even if such ground has not been specified in an appeal to the Commissioner. The case of *Govind Lal Roy v. Ramjanam Misser* (1) was cited from the Bar and it was contended that that decision of the Privy Council swept away the distinction between mere irregularity and illegality; but their Lordships held that when the estate was sold without there being an arrear the sale was ultra vires and the decision of the Privy Council in *Govind Lal Roy v. Ramjanam Misser* (1) did not in any way modify that position. This takes me to the question of what was the latest day of the payment in these cases. Ordinarily 7th June and 28th September were the latest days of payment for the various sums of money mentioned in the tauzi ledger and indicated above. Admittedly the estates were not in arrear for the kist of 28th September as the amounts were received in the treasury on 26th September 1923.

The case of the respondent is that the estates have been sold for the kist of 7th June 1923 and which amounts were received on 9th June 1923, i. e., after the latest day and therefore the estates were in arrears. In ordinary cases one was bound to hold that the estates were in arrears after sunset of 7th June and liable to be sold for that arrear in spite of the fact that the money was received in the treasury on 9th June. But in this case for the reasons which I shall presently give I hold that for the kist of 7th June the latest day of payment became 28th September 1923. This necessitates the examination of S. 3 and S. 5, Revenue Sale Law, again. I have already said that S. 3 of the Act empowers the Board of Revenue to fix the latest day of payment for the arrears which had fallen due. S. 5, it has been held, is a proviso to S. 3. Now the proviso, that is, S. 5, provides that in cases mentioned in the section the estate shall not be sold unless a notice prescribed in that section is issued 15 clear days before the date fixed under S. 3 specifying the nature and amount of the arrears of demand and the "latest date" on which payment thereof shall be received. S. 5 uses the words "latest date" in respect of the date to be fixed

by the Collector on which payment shall be received and then the words "the date fixed for payment according to S. 3 of this Act." These two cannot necessarily mean the one and the same date. They may be the same date and they may not be the same date. It is obvious that a day to be fixed by the Collector on which payment of arrears shall be received is described as the latest date. The section makes a distinction between these two dates, that is, a date fixed by the Board of Revenue and a date fixed by the Collector. I lay stress upon the words "and latest day on which payment thereof shall be received." Therefore in cases mentioned in S. 5 the Collector is required to fix a latest day on which the arrears shall be received. It is clear therefore that while under S. 3 the Board has been empowered to prescribe the latest date of payment for general application, in the cases specified in S. 5 the Collector has been required to fix a latest day of payment that is a special latest day for those cases. The provision of S. 5 was discussed very elaborately in the case of *Jahnnavi Chowdhurani v. Secy. of State* (13). It was held that S. 5 was the proviso to Ss. 2 and 3 of the Act and further that notice under S. 5 can only be issued after an arrear has been found due. In the case before us as the original kistbandi is not known one does not know when a particular amount became an arrear; what is known is that the latest day of payment for a certain amount was 7th June. It is therefore very doubtful whether the Collector could issue a notice under S. 5, 15 days before 7th June as is apparently the view of the learned District Judge. I think the Collector was right in not issuing the notice 15 days before 7th June but issued it 15 days before 28th September for both the kists because there is no question that all the amounts for which he issued notice had become an arrear on 1st September of that year.

In this case it appears that the estate was taken to be under attachment by order of the civil Court and the Collector therefore did issue a notice fixing 28th September 1923, as the latest day on which payment shall be received of the amounts of which the ordinary latest

(13) [1903] 7 C. W. N. 377.

day was 7th June 1923, and 28th September 1923. I am clearly of opinion that when the Collector exercises his powers under S. 5 and fixes a later date for the receipt of the arrears the day fixed by him becomes the latest day of payment in supersession of the general latest dates of payment fixed by the Board of Revenue under S. 3. S. 3 and S. 5 should be read together. While the dates fixed by the Board of Revenue are the dates of general application, in special cases the Collector has been given the power of fixing another latest date of payment in the particular cases specified in S. 5. The Collector having done so in this particular case the latest date of payment became 28th September. The learned advocate for the respondent contends as follows: His first contention is that this was not a case in which S. 5 had any application. He bases his agreement on two grounds: firstly, that the appointment of a receiver does not amount to an attachment by a civil Court and secondly, that on the day when the estate fell into arrears the receiver had already been removed and the properties were in possession of the plaintiff. Ordinarily it seems to me that when the Court appoints a receiver and thereby takes charge of the property and manages through an officer appointed by it the position becomes stronger than that of an ordinary attachment in execution of a decree and is an attachment by the civil Court. Be that as it may, I think it is not necessary to decide this point and it is too late now to allow the respondent to take up the position that it was not a case in which S. 5 had any application. Both the Courts have proceeded on the lines as if it was an admitted fact that the estate was one in which S. 5 applied. In the trial Court it was specifically held that it was so, and the learned District Judge also by implication had held in similar terms. The learned trial Court's observations are these:

"So the 8 annas Raj Srinagar was in possession of the Court . . . notice under S. 5, Act 11 of 1859 was required to be served."

And the learned District Judge observes:

"But the notice under S. 5 which according to law should have been published 16 days before 7th June were not published till 13th August."

The respondent himself who was an appellant before the lower appellate Court in his grounds of appeal took up the position that the notices under S. 5 had been properly issued and served. Similarly, the Collector also treated the estate as coming under S. 5 and issued notice under that section. In my opinion the respondent is not entitled to ask us to reopen the question whether or not it was a case where S. 5 applied. The next contention of the learned advocate for the respondent is that the non-issue of a notice under S. 5 is a pure irregularity which cannot be inquired into by the civil Court unless the ground is taken up before the Commissioner in appeal under S. 33 of the Revenue Sales Law. He relies upon the Privy Council decision in *Govind Lal Roy v. Ramjanam Misser* (1).

That was a case under S. 17 of the Revenue Sale Law which prohibits sale of an estate under circumstances analogous to those mentioned in S. 5. Their Lordships held that a sale held in contravention of the prohibition of S. 17 of the Act is not ultra vires and not without jurisdiction, the sale utmost is an illegal sale and cannot be questioned unless the ground has been taken up in appeal to the Commissioner under S. 33 of the Act, and the learned advocate argues by analogy that non-observance of the provision of S. 5 of the Act will not make the sale ultra vires. In my judgment there is a distinction between S. 5 and S. 17 of the Act. S. 17 prohibits the sale in certain circumstances; S. 5 is made up of two parts: one prohibits the sale in certain circumstances unless certain formalities of a notice have been gone into, the second part at the same time calls upon the Collector to fix a latest day of payment. As long as the latest day is not fixed by the Collector the general date fixed by the Board remains in force. The Privy Council case cannot be universally applied: vide remarks of Mitra, J., in *Ganesh Prasad v. Pandey Brij Behary* (14). His Lordship while dealing with the Privy Council case in connexion with the applicability of S. 8, Act 7 (B.C.) of 1868, which prescribes that after the grant of a sale certificate the irregularity etc., about notices cannot be inquired into, considered the cases of *Bal*

Mokoond Lal v. Jirjudhun Roy (15), *Mobarack Lal v. Secy. of State* (16) and *Harkhu Singh v. Bunsidhur Singh* (12) and observed:

"We do not think that the authority of these cases has been shaken in so far as they have dealt with S. 8, Act 7 (B. C.) of 1868 by the decision of the Privy Council in *Govind Lal Roy v. Ramjanam Misser* (1)."

Be that as it may, it is unnecessary for me to discuss the question of the effect of non-issue of a notice under S. 5, as in this case. As a matter of fact a notice under S. 5 was issued fixing 28th September 1923, as the latest date of payment. Once a notice under S. 5 fixing 28th September 1923 as the latest day of payment was issued, it became the latest day of payment in those particular cases in supersession of the general latest day of payment fixed by the Board of Revenue under S. 3 of the Act. The learned District Judge is in error when he treats the notice issued for the June kist in August as no notice issued, and says that in this case no notice under S. 5 was issued as it ought to have been issued for the kist of 7th June. He seems to be of opinion that it is compulsory upon the Collector to issue a notice under S. 5 of the Act 15 days prior to the earliest kist day fixed by the Board and treats this sale as without notice, but it is not so. For instance "clause first" of S. 5 contemplates arrears remaining unpaid for years together. What the section requires is that in the circumstances enumerated, if the Collector wants to proceed to sell he must issue a notice 15 clear days before the day fixed by the Board of Revenue, fixing a latest day on which arrears shall be received. He may not do so for kists after kists. I have already discussed this in detail when dealing with the decision of *Jahnnovi Chowdhurani v. Secy. of State* (13).

It may be, as I have said, that if the Collector does not issue a notice his act may be illegal but perhaps it will not affect his jurisdiction. But when he proceeds under S. 5 and fixes a latest day of payment that day becomes the latest day of payment and if there is no arrear on the day so fixed the sale becomes ultra vires. It is obvious that in this particular case the Collector did not proceed

under S. 5 for the June kist, before the June kist day, but he proceeded under that section for both June and September kists. The notices issued under S. 5 in this case Exs. E and E (1) show that it was so. It says that unless the arrears mentioned below are paid on or before the next latest day of payment, viz., 28th September 1923, the undermentioned estate . . . will be put up for sale . . . on 7th January 1924. The arrears mentioned are both the June and September kists. It then becomes necessary to examine whether or not there was arrear on 28th September, the latest day of payment fixed for the June kist by the Collector, and for the September kist both by the Collector and the Board of Revenue. There is no question that the September kist was received and paid on 26th September.

The only question to be discussed is about the payment of the June kist, which had already been received on 9th June and was lying with the Collector. It has been held by the Privy Council in *Mahomed Jan v. Ganga Bishun Singh* (17) that where the proprietor of an estate made a payment in respect of arrears of revenue and in the document which accompanied the payment to the Government, expressly appropriated it to the satisfaction of a particular kist, and the money was accepted and acknowledged by the treasury officer as paid on that account it was not in the power of one of the parties to the transaction, without the assent of the other to vary the effect of the transaction by altering the appropriation in which both originally concurred. In this case the money was expressly sent for the June kist, and was in the hands of the Collector and it cannot by any stretch of argument be said that the June kist remained unpaid on 28th September 1923. The observation of their Lordships in the case I have cited above refers to the arrear remaining unpaid on the day of sale as if the power of the Collector to sell depends upon the arrear remaining unpaid on the day of sale, but it is not necessary to examine this matter any further. It is enough for the purposes of this case that there was no arrear on the latest day of payment. In the case of *Dashrathi Ghose*

(15) [1883] 9 Cal. 271=11 C. L. R. 466.

(16) [1885] 11 Cal. 200.

(17) [1911] 38 Cal. 537=10 I. C. 272=38 I. A. 80 (P.C.).

v. *Khondkar Abdul Hannan* (18). It was held that the question as to whether an estate is in arrears is not a mere matter of form but of substance—a legal position to be inferred from all the circumstances, rather than a fact to be determined by a mere reference to the entries in the Collector's Register as relating to the particular estate. The facts of that case were similar to the facts of this case. There the revenue was sent through the post office and was received in the collectorate. It was not credited in the proper register as in the money order the number of the tauzi and the name of the thana were wrongly given. It was held that it was necessary to give the remitter an opportunity of making an application for the credit of the money for the revenue of the estate for which it was meant.

The sale of an estate for its arrears of revenue, the proprietor whereof had been deprived of a chance of correcting his mistakes by reason of the non-compliance of the aforesaid rules, is contrary to the provisions of the Act and must be annulled. There is no duty cast upon a remitter to be on the look out for the return of the acknowledgment or for any endorsement that may happen to be made therein. This case is much stronger than the one I have cited. Here there was no mistake, arrears were paid of course two days later than the latest day fixed by the Board of Revenue; but the latest day, as I have said was shifted to 28th September and the arrears of the June kist being already with the Collector he ought to have credited the amount to the arrears of land revenue. If he did not do so the plaintiff cannot be made to suffer. In this case, as I have said, the position is much stronger. The acknowledgment receipt of the money order is a complete acquittance. Nothing is indicated on them to show that the Collector did not appropriate the money towards the revenue and kept it in the revenue deposit. It is on the coupon portion which is kept in the treasury that such note has been made. The acknowledgment was received by the plaintiff and no intimation was given to him that the money was not being utilized towards the land revenue and was kept in the revenue deposit. The legal

position therefore is that a debtor paid money towards the satisfaction of the debt, a receipt was granted by the creditor to show that it was credited towards that account but behind the back of the debtor the creditor did not utilize the money towards the satisfaction of the debt and kept it somewhere else in deposit, and on the date fixed for the payment of the debt under S. 5 of the Act the debt was taken as still unsatisfied. This position cannot be sustained for one moment and it cannot be said that because the money of the June kist was lying in the revenue deposit from 9th June and still that kist remained unpaid on 28th September. Then again it is not clear for arrears of which kist the sale has been held. If it was held for the arrears of the September kist it was obviously ultra vires because the arrear of the September kist was undoubtedly paid on 26th September. It is said that the sale was as I have said for the June kist but the sale certificate issued to the purchaser says that the sale was to take effect from 28th September 1923. This sale certificate is issued under S. 28, Revenue Sales Act. S. 7 of the Act enjoins that notice shall be issued to the tenants not to pay rents due to the defaulting proprietor after the latest day of payment, that is, the title of the purchaser commences from the latest day of payment and the sale certificate obviously takes 28th September to be the latest day of payment. I have already held that the latest day of payment for the June kist was also 28th September. On that day there was no arrear, the June kist having been received on 9th June 1923 and the September kist on 26th September 1923. There being no arrears the sales were ultra vires. I therefore agree with my learned brother that the appeals be allowed, the decree of the District Judge be set aside and those of the Munsif be restored. It be declared that the sales held on 7th January 1924, of the estates bearing Tauzi Nos. 2480 and 2480 1 of Monghyr Collectorate was without jurisdiction and null and void. The appellant will get his costs throughout.

B.V./R.K.

Appeal allowed.

* A. I. R. 1932 Patna 33

MOHAMAD NOOR AND SCROOPE, JJ.

(Syed Shah) Muhammad Kazim—Defendant—Appellant.

v.

(Syed) Abi Saghir and others—Plaintiffs—Respondents.

First Appeal No. 131 of 1928, Decided on 6th July 1931, against decision of Dist. Judge, Monghyr, D/- 12th May 1928.

(a) Mahomedan Law—Wakf—Meaning of, explained.

The term "wakf" literally means "detention or stoppage" and the legal meaning of wakf according to accepted doctrine of the Hanafi school is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of mankind. [P 36 C 2]

(b) Mahomedan Law — Wakf—Appropriation to charitable purposes is sufficient.

The appropriation of land or other property to pious and charitable purposes is sufficient to constitute a wakf without the express use of that term in the grant. [P 36 C 2]

A grant to an individual, heritable by his descendants, may be a wakf in spite of the fact that the word "wakf" is not mentioned and that there is no transfer of the property to God. In order to interpret a document and decide as to whether the property granted to an individual by name is or is not wakf, it is necessary to refer to the customary use of the income of the property: (Case law referred). [P 37 C 1, 2]

* (c) Mahomedan Law — Wakf—Requirements and essentials of, stated.

The requirement of a valid wakf is a substantial dedication of the usufruct of the property to charitable, religious or good purposes as understood in the Mahomedan law: no particular form is necessary; a wakf may be construed from royal grants of properties made in favour of individual persons as long as it was for perpetual, religious, charitable or good purposes: the dedicator need not use the word "wakf" at all or may not formally transfer the properties to the ownership of God. If there is a substantial dedication to a valid object, it will not cease to be a wakf because some objects are mentioned which are not legal objects of wakf. [P 38 C 1, 2]

The essentials of a valid wakf are these: an appropriator must destine the ultimate application of the income to the objects not liable to become extinct; secondly, the appropriation must be at once complete; thirdly, there must be no stipulation in the wakf for sale of the property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity must be a necessary condition. True it is that perpetuity is a necessary condition; but according to the acknowledged and accepted view it is not necessary to mention it at the time of dedication: in other words, though all the jurists insist that the property should be dedicated permanently and right of donor therein parted with for ever, according to Abu Yusuf it is not necessary that the word "abad" (perpetual) should be mentioned or that the object in favour of which

the dedication is primarily made should be of a continuing and permanent character. According to him, when the dedicator has named a purpose liable to failure, even then wakf is valid, after failure of the object the property will be for the poor though they are not named: (Case law referred). [P 42 C 2]

(d) Mahomedan Law — Wakf — Grant to dead person cannot be construed as grant to his successor.

A present to a dead man cannot, by any stretch of imagination, be construed to mean a personal grant to the successor of the saint: 53 I. C. 677, Ref. [P 40 C 1]

(e) Mahomedan Law—Khankah, sajjadanashin—Meaning of, explained.

A kankah is a monastery or religious institution where darveshes and seekers of truth congregate for religious instruction and devotional exercises. It is generally founded by a darvesh or a sufi professing esoteric belief, whose teachings and personal sanctity have attracted disciples, whom he initiates into his doctrine. After his death he is often revered as a saint. A khankah is usually under the governance of a sajjadanashin (the one seated on the prayer mat) who not only acts as muttawali or manager of the institution and of the adjoining mosques, but also as the spiritual preceptor of the adherents. The founder is generally the first sajjadanashin, and after his death the spiritual line (sil silla) is extended by succession of sajjadanashins. Generally members of his family, chosen by him according to the direction given by him in his lifetime or selected by the fakirs and murids, are formally installed: (Case law referred). [P 40 C 2]

* (f) Mahomedan Law—Wakf—Expenditure mentioned in grant on sajjadanashin is trust and not personal grant.

Provision for a sajjadanashin is not a provision for the man, but for the institution. A khankah cannot exist and continue without a sajjadanashin. In other systems the personal expenditure of the head of such an institution has been curtailed to almost nothing by enjoining celibacy, as for instance, in the case of Christian monasteries or Hindu mutts and sangats. But Islam prohibits celibacy and a saint with a family is the rule rather than an exception. In these circumstances devotees and adherents of khankah have always made provisions for maintenance of the sajjadanashin and his family so that he may devote all his time to imparting religious and spiritual instructions to his disciples and be free from secular cares. A sajjadanashin is an integral part of the institution and the central figure so to speak therein. Its existence depends on his personality. In him is supposed to continue the spiritual line. Therefore provision for his maintenance and that of his descendants is a provision for him as the head of the institution. It is a trust and not a personal grant. [P 41 C 2]

(g) Mahomedan Law — Wakf — Validity — Fund given for charitable and noncharitable objects without due apportionment—Court can apportion it.

A wakf is not invalid if the proportion of appropriation between several objects is not specified. When a testator gives funds partly for objects which are charitable and partly for objects which either are not charitable or does

not specify the proportion in which the funds are to be applied for the different objects, the Court will make an apportionment. The proposition that an assignment of the income means an assignment of the corpus is not of universal application. It depends upon the terms of the grant and its construction: (*Case law referred*).

[P 43 C 2; P 45 C 1]

(h) Mahomedan Law—Wakf—Partition of profits is allowable.

Though the partition of the endowment itself is illegal, a partition of the profits arising therefrom is allowable. The profits also of endowment belong of right to the heirs and should be distributed amongst them; but the law of inheritance does not obtain in this species of distribution, the heirs taking per capita. The fact that in any particular case the division has been per stirpes and not per capita does not affect the question. This is a matter between them inter se and will not in any way prejudice the charitable and religious character of the endowment.

[P 46 C 1]

(i) Regulation 19 of 1810 — Institution not taken charge of under—No presumption that it is not public endowment.

If an institution is not taken charge of under the Regulation it is not to be presumed that it was not a public endowment. If it was taken charge of, it will be almost conclusive proof of the fact that it was a public institution. But the converse is not correct.

[P 47 C 1]

(j) Civil P. C. (1908), S. 92—S. 92 applies to property burdened with obligation of public or religious nature.

Section 92 applies to Mahomedan wakfs and to Hindu debuttars where there is no conception of two estates and two ownerships. What is required for the purposes of S. 92, is to find whether or not there is a property burdened with obligations for public purposes of a charitable or religious nature. It will apply in all cases, whether wakf or not, where there is an obligation annexed to the property in favour of religious or charitable objects of a public nature.

[P 48 C 1, 2]

(k) Mahomedan Law—Trust as obligation attached to ownership of property is recognized.

A trust in the technical sense of English law (that is a double estate; one legal and another equitable) is unknown in the Mahomedan law. But a trust in the sense of being an obligation attached to the ownership of the property is known and recognized by the Mahomedan law. Trust, apart from wakf, is recognized by the Mahomedan law and is known as "amanat:" (*Case law referred*).

[P 48 C 2]

*** (l) Civil P. C. (1908), S. 92—Provision for maintenance of khankah is object of public nature and S. 92 applies.**

In any trust for the benefit of the public there is no privity of contract between the grantor and the grantee on the one hand and beneficiaries on the other: the beneficiaries come in because they are beneficiaries.

It is a settled law that the word "public" means a section of the public, and it cannot be disputed that provisions for maintenance of khankahs and for the distribution of alms and charities, etc., are objects of a public nature, and S. 92 has full application in such cases.

[P 51 C 1, 2]

(m) Evidence Act (1872), S. 115—Trustee is estopped from claiming trust property as private property.

Where a person has come into possession of property as a trustee, he is estopped from taking up the position that it is his private property: 34 *Mad.* 257 and *A. I. R.* 1924 *P. C.* 221, *Ref.*

[P 51 C 2]

(n) Civil P. C. (1908), S. 92—Suit under—Trustee only is necessary party.

Only the trustee is a necessary party and not those who may be in possession of trust properties even adverse to the trust: 35 *I. C.* 880, *Ref.*

[P 52 C 1]

*** (o) Civil P. C. (1908), S. 92—S. 92 applies although trust is not admitted.**

When there is a breach of trust a suit for declaration that there is a trust and for the preparation of a scheme or the removal of the trustee can only be instituted under S. 92 of the Code. Such a suit will not be entertainable if instituted as an ordinary civil suit. The section applies even when the trust is not admitted and its very existence is in dispute.

[P 52 C 1]

(p) Mahomedan Law — Wakf — Sajjadanashin—If of immoral character and repugnant to public, he can be removed—Civil P. C., S. 92.

A sajjadanashin is removable only if a proper case is made out. Cases of mismanagement or incapacity will not ordinarily be sufficient to remove a sajjadanashin as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property, but that he is of such a low morality that his continuance as the superior of the sacred shrines and institutions is repugnant and undesirable. A sajjadanashin, who is also a manager, may be deprived of managership, though he may be retained as sajjadanashin: 3 *I. C.* 508, *Diss. from*.

[P 52 C 2]

(q) Mahomedan Law — Wakf — Sajjadanashin—Powers of expenditure are wider than those of muttawali.

A sajjadanashin is not a muttawali and his powers of expenditure are wide; and as long as he keeps up the institutions in a fairly decent condition he is not accountable to anybody.

[P 54 C 2]

(r) Civil P. C., S. 92—Scheme for management—Court is not bound to follow terms of grant.

In preparing a scheme under S. 92 the Court is not bound to follow either the terms of the grant, if any, or even the usage which has been in force so far: (*Case law referred*).

[P 54 C 1]

Abdul Rahim, Hasan Jan, A. A. Syed, Syed Hasan, Gholam Muhammad and H. R. Kazmi—for Appellant.

Khurshaid Husnain, Muhammad Hafiz, Syed Ali Khan, A. H. Fakruddin, Amir Ali Khan Warsi, Syed Naimul Haq Ali Saghir & Ahmad Reza—for Respondents.

Mohamad Noor, J.—This appeal arises out of a suit instituted with the previous sanction of the Legal Remembrancer under S. 92, Civil P. C., and relates to the properties mentioned in Schs. 1-a and 1-b of the plaint, commonly known as the Maulanagar Khan-

kah estate, on the allegation that they are public trust properties and is for their declaration as such with a prayer that a scheme be prepared for their management and for the removal of the defendant from his office of sajjadanashin and manager and, finally, for a declaration that a substantial part of their income is to be spent upon public, religious and charitable objects.

Moulanager estate has its origin from a Mahomedan saint, Shah Najimuddin alias Shah Maula, who settled in the locality some time in the latter part of the seventeenth or in the earlier part of the eighteenth century A. D. This saint seems to have attracted the attention of the Ruler of Bengal and a grant of pargana Abhaipur was made to him. This grant is not available nor its exact date is known, but its terms can fairly be gathered from a subsequent grant or sanad relating to this very pargana in favour of Shah Gholam Moula, the successor of Shah Najimuddin. By this sanad dated 22nd Jama-deus-sani 1161 A. H. (1748), Nawab Alivardi Khan, the Governor of Bengal, made or confirmed a grant of Abhaipur to Shah Gholam Maula who, it is said, was the wife's brother of Shah Najimuddin, a fact which has been accepted by the compiler of the Gazetteer of the District of Monghyr. Two copies (or copies of copies) of this sanad are on the record. A complete copy has been filed by the plaintiff (Ex. 50) and an incomplete one (Ex. 5) by the defendant. They are in the form of an order to the revenue officer of the State (motasaddis, etc.). Leaving aside the controversial words of the sanad for the present it recites that the entire pargana aforesaid (Pargana Abhaipur Sarkar Monghyr in the province of Bihar) had been from before granted revenue-free (*sic*) for defraying the expenses of the drum-beaters appointed by Huzur (the Nawab himself) and for the casual visitors to the Moulanager Khankah and as madadmash (maintenance) of the holy saint Hazrat Shah Najimuddin Ali deceased. It then proceeds that, having regard to the rights (or claims) of the Great Divine Shah Gholam Moula sajjadanashin (successor) of the deceased saint the grant as per detail is confirmed in the name of the Great Sheikh Muhammad Bhek, a servant of the said Shah.

"It is proper that you (meaning the revenue

officer of the pargana) should consider that the entire pargana aforesaid is granted revenue-free for defraying the expenses of the casual visitors to the Moulanager Khankah and the drum-beaters appointed by Huzur and madadmash (maintenance) to Shah Ghulam Maula descendable to the children, etc., etc."

Then comes the details of the properties and again the terms of the grant are practically repeated.

This grant was by a sanad dated 11th March 1791 (Ex. U) in favour of the descendants of Shah Gholam Moula confirmed by the East India Company when they took over the Diwani of Bengal, Bihar and Orissa. It appears that (the exact date is not known) another grant consisting of Mustafanagar, etc., was made in istamrari mukarrari settlement to Shah Gholam Moula by the Governor of Bengal under the seal of Raja Sitab Rai. This was also confirmed by the East India Company under a sanad dated 7th February 1787 granted to the aforesaid persons. This recites that Mustafanagar and Murtazanagar, etc., were given in istamrari mukarrari to Shah Gholam Moula for defraying the expenses of the students, the faqirs (beggars) and the casual visitors of Moulanager Khankah and confirms and enjoins that the said persons should make proper cultivation of the said villages and, after payment of the istamrari mukarrari jama, should utilize the entire jama in defraying the expenses of the casual visitors, students, etc. The revenue-free property of Pargana Abhaipur and the mukarrari istimrari of Mustafanagar, etc., and their appurtenances are the subject-matter of the present litigation.

The suit was instituted by five plaintiffs, but subsequently nine Mahomedans of Moulanager with, the sanction of the Legal Remembrancer, were added as plaintiffs. Four of the latter subsequently withdrew from the suit and the remaining ten proceeded with it. The plaintiff's case is that the properties described above namely, pargana Abhaipur and villages Mustafanagar and Murtazanagar, etc., are endowed properties and constitute a trust for public purposes of a religious and charitable nature and that a substantial part of their income should be spent towards such object. They allege that according to the custom prevailing in this trust the properties are managed by sajjadanashins and that on the death of a sajjadanashin his succes-

sor is elected by the maintenance-holders who are by courtesy called shareholders. The sajjadanashin is to spend suitable amounts on the religious and charitable objects of the trust and to distribute the balance among the descendants of Shah Gholam Moula called by courtesy shareholders; and according to the same custom the sajjadanashin on his installation is to execute an ekrarnama binding himself to carry out the objects of the trust, and, as its counterpart, the electors execute a mahzarnama describing the duties of the sajjadanashin and the manner in which he is to carry them out. The plaintiff goes on to say that in pursuance of this custom the last sajjadanashin was Shah Sami Ahmad, that up to his time visitors were looked after and a madrasa was kept up and in short the trust was fairly well managed. On his death in 1913, however the defendant was elected sajjadanashin, though with some demur. He has avoided the execution of the customary ekrarnama and he committed various acts of malfeasance and misfeasance. Consequently in October 1922, with the previous sanction of the Legal Remembrancer, a suit was instituted for his removal. In that suit the defendant denied the existence of wakf, but later on the matter was compromised out of Court; and on the petition of both the parties the suit was dismissed without costs on 22nd June 1923, the defendant having executed an ekrarnama on 21st June 1923. The terms of this ekrarnama are given in detail in the plaintiff. It is alleged now that subsequently the defendant started committing acts of mismanagement and breaches of trust and has even gone the length of cancelling the ekrarnama executed by him on 21st June 1923. On these grounds the plaintiffs seek the removal of the defendant from the sajjadanashinship of the khankah and estate and ask for preparation of a scheme for their management.

In the written statement the defendant controverts almost all the allegations of the plaintiff, and on the pleadings the learned District Judge framed nine issues and decided all in favour of the plaintiff. He has passed a decree removing the defendant, directing the full discovery of the trust estate and the taking of its accounts from the defendant, declaring that the public, charitable and religious

objects are a first charge on the estate and directing the preparation of a scheme for carrying out the objects of the trust. He has appointed a receiver to take charge of the properties pending preparation of the scheme and the appointment of a manager or sajjadanashin. The defendant has appealed.

Sir Abdur Rahim appearing on his behalf has confined himself to issues 1, 5 and 6 as framed by the learned District Judge:

"(1) Is the suit maintainable?

(5) Is the subject-matter of the suit a trust property as contemplated by S. 92, Civil P. C.?

(6) Has the defendant been guilty of the charges set out in para. 22 of the plaintiff on any breach of trust or neglect of duties, and is he or not a fit and proper person to hold charge of the trust properties?"

Issue 5 is the main issue in the case and I take it up first. Sir Abdur Rahim contends that the property in suit is neither a wakf under Mahomedan law nor a trust under English law. The term "wakf" literally means "detention or stoppage" and the legal meaning of "wakf" according to the accepted doctrine of the Hanafi School is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of mankind.

The earliest decision on the question is *Kulb Ali Hussain v. Syf Ali* (1). There the Court had to construe a Royal grant enjoining that Mauza Bishunpur should be exempted from the payment of revenue, that the profits arising from its land should be applied to the support of religious mendicants and students and the repairs of mosques and other public edifices, and that the general superintendence of its resources should be confided to one Darvesh Hussain and should remain vested in him, his heirs and successors. The Saddar Diwani Adawlut, basing its decision upon the opinion of its law officers, held this to be a wakf. The law officers declared that the appropriation of land or other property to pious and charitable purposes is sufficient to constitute a wakf without the express use of that term in the grant. The grant was again in issue in the case of *Asheerooddeen v. Sreemutty Drobo Moyee* (2) and was found to be a wakf. See also the *Sasaram case*. *Mt. Quadira v. Shah*

(1) [1814] 2 Sel. Rep. (S. D. A. Beng.) 139.

(2) [1875] 25 W. R. 557.

Kabeer Ooddeen Ahmud (3), the second of the two grants which formed the subject-matter of that case is an order on the Revenue Officers (as in the present case) in the following terms. :

" granted as inam altumgha free from all charges to Shah Quamooddeen for the support of travellers. Let the imperial officers constantly remembering this order leave the above grants in his and his children's possession from generation after generation."

In this case the grant was to Shah Quamuiddin by name and not by virtue of his holding any office, to him and his children, heirs and successors for the support of travellers, etc. The words used are "warid sadir" as in the grant which is the subject-matter of the present litigation. Thus the only difference between the grant in the Sasaram case and this grant is that there is a clear mention of a provision for the maintenance of the grantee and his descendants. The effect of this case is to lay down that a grant to an individual, heritable by his descendants, may be a wakf in spite of the fact that the word "wakf" is not mentioned and that there is no transfer of the property to God. The muftis, while dealing with the firman which I have quoted above, expressed their views in the following terms:

"We infer from the purport of the second firman that Sheikh Quamuiddin is the grantee and the travellers are mentioned, because many such alight at a Sheikh's house and become a burden on his hospitality. Whereas then Sheikh Quamuiddin is a determinate grantee, the intent of the grantor is the creation of a proprietary right in him by that permanent grant and not a wakf."

This is exactly the contention of Sir Abdur Rahim before us. He argues that as the travellers and others used to visit Shah Najimuddin and Shah Gholam Moula, the grantor made a grant to them personally in order to enable them to meet the expenses. When the case was referred to Kaziulkazzat, he gave as his opinion that

"there were some expressions in particular firmance which might be considered as conveying a gift with certain stipulations for the repair of the khankah and support of the poor and others which supported the construction of their being a grant of wakf."

Then comes a very important passage:

"In cases of such perplexity he declared reference should be had to the custom of the country and the question should be decided by the sense attached by common usage to the expressions."

(3) [1824] 3 Sel. Rep. (S. D. A. Beng.) 544.

In other words, the opinion was that in order to interpret a document and to decide whether the property granted to an individual by name is or is not wakf, it is necessary to refer to the customary use of the income of the property. The sasaram wakf came up again for consideration before the Privy Council in *Jewan Doss Sahoo v. Shah Kabirooddeen* (4). Their Lordships construed the grant and held that the word "altumgha" or "altumgha inam" used in the Royal grant does not by itself convey an absolute proprietary right to the grantee where from the general tenor of the grant it is to be inferred that a wakf or endowment to religious and charitable uses was intended; and that it is not so necessary to consider the words used in the grant as to find out what the intention of the grantor was. When I come to consider the various documents produced in this case, I shall show from the grants that the grantor intended that at least a substantial portion of the income of the property if not the whole of it, should be devoted to public, charitable and religious purposes. Sir Abdur Rahim relies upon the decision in *Fatima v. Saheba Jan* (5). In this case there was the sanad as usual addressed to the must addis, chowdhuries and kanungoes of Pargana Bhagalpur. The grantee had a large family to support and had to defray the expenses of a khankah for travellers and benighted students etc. and in consideration of this the village was given to him at a fixed annual jama of Rs. 896. It was found as a fact that the property had never been considered as endowed by any of the descendants of the original grantee and was not wakf. In this case the grant was made in favour of an individual and recited that the grantee had to meet certain expenses and therefore the grant was being made it was clearly a case in which the expenses incurred by the grantee were motives for making the grant and the treatment of the property as private was considered as a ground for holding the property not to be a wakf.

The next case to be considered is the decision in *Muthu Kana Ana Ramana-dhan Chettiar v. Vava Levvani Marakayar* (6) which was modified by the Privy

(4) [1840] 2 M. I. A. 290=6 W. R. 3 (P.C.).

(5) [1867] 8 W. R. 313.

(6) [1911] 34 Mad. 12=6 I. C. 1.

Council: *Mutu K. A. Ramanandan Chettiar v. Vava Levvai Marakayar* (7). The High Court as well as the Privy Council held that the test whether a deed was or was not valid as wakf was to see if the effect of the deed was to give the property substantially to charitable uses. Then the Judicial Committee observed that in that case though the sum devoted to the charities was not large for the present it was abundant for their need and that the dominating purpose and the intention of the grantor in executing the deed was to provide for those charities. In the case of *Abdur Rahim v. Narayan Das Aurora* (8) their Lordships of the Privy Council had to consider the question of a wakf in which there were severable provisions for substantial religious purposes and for the benefit of the settlor's family. The dedication was held to be a wakf in spite of the fact that there were some provisions for the maintenance of the family of the dedicator himself.

Another case is *Balla Mai v. Ata Ullah Khan* (9) where their Lordships held that the wakf is not necessarily bad because of auxiliary provisions made therein by the settlor for the maintenance of himself and his dependants. But it was held that if the bulk of the income is settled on the line of one's own descendants and need only go to charity on failure of any such line—an event which might be definitely postponed—and the settlor's real purpose is to make a family settlement there can be no substantial dedication of the property to charity and the wakf would in consequence be invalid. In consequence of the passing of Act 6 of 1913 and Act 32 of 1930 the last view is no longer law but this case is an authority for the proposition that a "substantial dedication to charity is sufficient to validate a wakf."

The following principles seem to me to emerge from the above cases: the requirement of a valid wakf is a substantial dedication of the usufruct of the property to charitable religious or good purposes as understood in the Mahomedan law; no particular form is necessary;

a wakf may be construed from Royal grants of properties made in favour of individual persons as long as it was for a perpetual religious charitable or good purposes: the dedicator need not use the word 'wakf' at all or may not formally transfer the properties to the ownership of God. If there is a substantial dedication to a valid object it will not cease to be a wakf because some objects are mentioned which are not legal objects of wakf.

This being the law let us examine whether the properties in question are wakf. The earliest document available is Ex. 50, a copy of a grant by Alivardi Khan to Ghulam Bhek, a servant of Shah Gholam Moula. At the top of this copy there are words the reading and meaning of which have been the subject-matter of controversy before us. The appellants would read them as "naqul-Moula Karim" and contend that the first word "naqul" means a copy. This according to the appellants is no part of the contents of the grant. They contend that the copyist started with this heading in order to indicate that it was a copy of a copy. They would take the subsequent two words "Moula Karim" to indicate the name of the grantee. The respondents contend that the words are "Bafazal Moula Karim" meaning "by the grace of the Master, the benefactor" and that as the Governor of Bengal was creating a wakf, and dedicating the property to God, he invoked His blessings.

In my opinion it is not at all necessary to decide this controversial question. The reading of the first word may be either "naqul" or "bafazal." Most probably it is "naqul" (copy) indicating that it is being copied from a copy and the next words "Moula Karim" may be the invoking of God. It has been the practice even up till recent times (though now rarely) in writing anything even private letters, to begin with the name of God. This does not indicate anything. Mahomedans call the deity by various names which are about 100 in number. They are called "isim safat" (the names of the attributes of God) as distinguished from "isim zat" (the name of the person of God). The word "Allah" meaning "God" is the name of the person of God. All other names are the names of his attributes: as for instance, Rahim merciful; Ghaffar forgiver, and so on. The word "Moula

(7) A. I. R. 1916 P. C. 86=39 I. C. 235=44 I. A. 21=40 Mad. 116 (P.C.).

(8) A. I. R. 1923 P. C. 44=71 I. C. 646=50 I. A. 84=50 Cal. 329 (P.C.).

(9) A. I. R. 1927 P. C. 191=103 I. C. 518=54 I. A. 372 (P.C.).

Karim" literally mean, "Master the benefactor." Among other names the word "Moula" has particularly been used here having regard to the name of the man in whose favour the grant was being made. A similar thing will be found in Ex. 30. At the top of it is the word "Howal quadir" meaning: "He is the powerful" namely the deity. But this particular attribute of God (that is, Quadir powerful) has obviously been used in consideration of the name of the saint in whose spiritual line the writer of the document was, i. e., Seikh Abdur Quadir Jilani, the famous saint of Bagdad: see the evidence of the defendant Shah Muhammad Kazim. This choosing of a particular attribute of God to indicate God himself is sometimes done according to the occasion when that name is being used.

I am therefore of opinion that the words "Moula Karim" at the top of the document refers to God, but is merely formal, the epithet being chosen in consideration of the name of the man who was the ostensible grantee. This does not help either the plaintiff or the defendant. There are however later on the words, "nazar Moula Karim" which mean "offering or present to Moula Karim." The official translator has not translated the words "Moula Karim" and their translation was again a subject-matter of controversy between the parties. The appellant contends that it is the name of the grantee in whose favour the grant was being made and according to the respondent it means "God." Its literal meaning is "Master the benefactor. I shall discuss this later on. Leaving aside these controversial meanings of some words the grant says:

"Whereas the entire pargana aforesaid (Pargana Abhaipur) has been from before granted revenue-free as nazar (present) (torn) for defraying the expenses of the drum-beaters appointed by the Huzur (i. e. the Governor himself) and of the casual visitors to the Moulanagar khankah and madad mash (help for livelihood) to the only saint Hazrat Shah Najimuddin Ali deceased, now having regard to the rights (or claims) of the Great Divine Shah Gholam Moula Sajjadanashin (successor) of the deceased saint, the grant as per detail is confirmed in the name of the Great Sheikh Mahomed Bhek, a servant of the said Shah."

Having found the translation of this grant in the paper book to be unsatisfactory, we directed a retranslation by the head translator. Copies of this were

supplied to the parties and one is attached to this judgment and the case has been argued on its basis. The words torn were obviously "Moula Karim." This is clear from the use of this word later on in the description and in some subsequent rubkars. The grant is addressed to the revenue officers of the Pargana Abhaipur. It is obvious by reading the grant as a whole that before this grant this very pargana had been given in revenue free grant to Shah Najimuddin Ali. It is immaterial whether the words used in the description "nazar Moula Karim" refer to Shah Najimuddin, who was admittedly called Shah Moula also, or indicate a present to God. As I have said, to constitute a wakf it is not necessary that the property should specifically be made over to God. On the other hand a grant to a person may be wakf. The learned District Judge thought that an epithet applicable to the deity could not have been applied to a human being however saintly he might be and that view is in accord with strict Islamic ideas, but the fact is that in course of time these exclusive attributes of God have come to be applied to human beings of high and saintly character; for instance Hazrat Ali, son-in-law of the Prophet is called Moula Ali indicating that he is the master of all.

In my opinion the words "nazar Moula Karim" are not used in respect of the grant which was then being made by this document to Shah Gholam Moula. It says that the property was from before "nazar Moula Karim" i. e. a present to Moula Karim. The grant in question (Ex. 50) is a confirmation or renewal of a grant which had been made previously to the predecessor of Shah Gholam Moula, namely, to Shah Najimuddin. As I have said it is not of much importance as the case law indicates in whose name the grant is made. The question always is, for what purpose the grant is made? This document shows that prior to this grant there was a khankah at Moulanagar; that drum-beaters were deputed by the Governor at that khankah and that the grant was made to Shah Najimuddin for the purposes of maintaining these drum-beaters who were deputed by the Governor and for the expenses of the casual visitors to the khankah and for the maintenance of the saint himself. The question arises, whe-

ther a grant like this is or is not a wakf?

The points for consideration are :

(1) Was this a grant to the institution, namely, to the khankah of Moula-nagar, or was it a grant to Shah Gholam Moula personally?

(2) Is the expenditure mentioned in the grant simply a recital of the motive for making the grant or is it the object of the grant?

(3) Are the objects fit ones for a valid wakf under the Mahomedan law?

(4) Does the grant fulfil the requirements of a valid wakf under the Mahomedan law?

(1) I have already mentioned that the grant starts with a recital that Pargana Abhaipur had been from before a revenue free grant as nazar (torn) and I have held that the portion torn was certainly "Moula Karim." I have no doubt also that the property in question has been described as "Nazar Moula Karim" that is, a present to Moula Karim. It is to be noted that the sanad recites that at the time of this grant Shah Najimuddin was dead. If the words refer to him, then it means that the property was being presented to the deceased saint. Now a present to a dead man cannot, by any stretch of imagination be, construed to mean a personal grant to the successor of the saint. In the case of *Sujjada Mahamad Yusuf v. Shaw Habit* (10) there was a grant to a living saint Hazrat Khaja Rahamtulla as a present to the Prophet Muhammad for the purpose of feeding the poor and it was never contended that it was not a valid wakf or that it was a personal grant to the saint. Therefore in my opinion whether the words "Moula Karim" refer to Shah Najimuddin who was then dead or to God, they in no way indicate a personal grant to Shah Gholam Moula. As to the nature of a khankah and the position of a sajjadanashin, they have been referred to in various decisions: see *Vidya Varuthi Thirtha v. Balusami Ayyar* (11), *Piran Bibi v. Abdool Karrim* (12) and *Mohiuddin v. Sayiduddin* (13) and are fully described in Amir Ali's Mahomedan law, Vol. 1.

(10) [1919] 53 I. C. 677.

(11) A. I. R. 1922 P. C. 123 = 65 I. C. 161=48 I. A. 302=44 Mad. 831 (P.C.).

(12) [1892] 19 Cal. 203.

(13) [1893] 20 Cal. 810.

In *Muhammad Hamid v. Mean Mahmud* (14) Lord Cave, in delivering the judgment of their Lordships of the Privy Council, observed that the khankah is a monastery or religious institution where darveshes and seekers of truth congregate for religious instruction and devotional exercises. It has generally been founded by a darvesh or a sufi professing esoteric belief whose teachings and personal sanctity have attracted disciples, whom he initiates into his doctrine. After his death he is often revered as a saint. A khankah is usually under the governance of a sajjadanashin (the one seated on the prayer mat) who not only acts as muttawali or manager of the institution and of the adjoining mosques, but also as the spiritual preceptor of the adherents. The founder is generally the first sajjadanashin and after his death the spiritual line (sil silla) is extended by succession of sajjadanashins. Generally members of his family chosen by him or according to the directions given by him in his lifetime are selected by the fakirs and murids are formally installed.

Now it will be noticed that the grant now in question was made to Shah Gholam Moula describing him as sajjadanashin of the deceased saint Shah Najimuddin. In fact it is a renewal of the grant which had already been made to Shah Najimuddin: the property is the same, the purposes of the grant are the same and the expenditures mentioned are the same. Under the circumstances on the grant itself it cannot but be held that the grant was being made to the institution and not the saint.

Then it should be noticed that though the grant being made to Shah Gholam Moula, the actual grant is in the name of his servant Sheikh Gholam Bhek. The compiler of the Gazetteer, basing his information on tradition, says that Shah Gholam Moula did not like to take a grant for himself, but agreed to take it if it was for charitable purposes. This tradition is certainly of some value and is admissible in evidence.

(2) Now as to the expenses mentioned in the grant itself, the order in which they are mentioned are of no importance. The first is the item, drum beaters deputed by Huzur i. e., the Governor himself. The translation of Naubatnawaz

(14) A. I. R. 1922 P. C. 384=77 I. C. 1009=50 I. A. 92=4 Lah. 15 (P.C.)

as drum-beaters is in a way correct, but requires a little explanation. "Naubat" literally means "turn" and "Nawaz" means one who plays a musical instrument. In days when striking clocks were not in vogue Kings and other big men used to employ drum-beaters to beat drums to make the time. There was also Naubat played on ceremonial and festive occasions; it was a paraphernalia of the King. Saints are treated as Kings of the spiritual world. The appellation "Shah" (which means) "King" is almost invariably used before their names as is borne out from the sanad itself where the grantee and the deceased saint were described as Shah Najimuddin and Shah Gholam Moula. The khankahs of these saints were treated by their successors and by the devotees as if they were King's Courts and devotees provided for these institutions the paraphernalia of a King's Court. The "ura," i.e., the anniversary of the death of the saints took the place of the ceremonials of a Royal Court. Accordingly in this sanad we find the Naubat Nawaz or drum-beaters were deputed by Nawab Alivardi Khan himself and naturally the Nawab had to make provisions for their maintenance. It cannot therefore be said that this was an expenditure which Shah Najimuddin or Shah Gholam Moula were incurring themselves and it was with a view to relieve them of this burden that this grant was made.

The next item of expenditure is "warid sadir." Warid means incomer and sadir means outgoer. The two words taken together mean casual visitors or travellers. I have described a khankah. When a khankah is established and the reputation of the saint presiding at it spreads far and wide, large numbers of persons come to visit him and to receive from him religious and esoteric teachings. Apart from these the institution becomes a shelter for wayfarers and forlorn and indigent travellers. It is absolutely impossible for the saint to provide for their board and lodging. Ordinarily, unless there is a sufficient income attached to the institution such people have to make their own provisions or go away disappointed. Pious men with religious instincts have from time to time made provisions for these people. The word used in the sanad is "jehet" which means "for the purpose of." It is the same word which has been used in the Sasaram

grant which had been the subject-matter of various decisions referred to above. Clearly the grant was for the purpose of the expenditure on these casual visitors and travellers and not as a motive to relieve the grantee from the expenses which he had been incurring. The words are "*warid sadir khankah Moulanagar*" (casual visitors to the khankah at Moulanagar) and not casual visitors to the grantee.

The next item is "madad mash" to the grantee, namely, Shah Najimuddin or Shah Gholam Moula and his descendants. The question arises whether this was for the purpose of maintaining the grantee in his individual and private capacity or in his capacity as sajjadanashin. Provision for a sajjadanashin is not a provision for the man, but for the institution. A khankah cannot exist and continue without a sajjadanashin. In other systems the personal expenditure of the head of such an institution has been curtailed to almost nothing by enjoining celibacy as for instance, in the case of Christian monasteries or Hindu mutts and sangats. But Islam prohibits celibacy and a saint with a family is the rule rather than an exception. In these circumstances devotees and adherents of the khankah have always made provisions for the maintenance of the sajjadanashin and his family so that he may devote all his time to imparting religious and spiritual instruction to his disciples and be free from secular cares. A sajjadanashin is an integral part of the institution and the central figure so to speak therein. Its existence depends on his personality. In him is supposed to continue the spiritual line. Therefore I would hold that the provision for the maintenance of Shah Gholam Moula and his descendants was a provision for him as the head of the institution which he was then occupying as a sajjadanashin of Shah Najimuddin. It was a trust and not a personal grant. In the case of *Mahomed Athar v. Ramjan Khan* (15) the grant was described as madadmash (for the maintenance) of the muttawali. The learned Judges held that it was a public endowment. Their Lordships observed as follows:

"The expression "madad mash" has been defined in Mitra's Tagore Law Lectures (1885) on the Land Law of Bengal as follows: Madad-

mash grants are not uncommon in Bengal. They were made for religious purposes and as such are inalienable. The grants were in perpetuity. The distinction between madadmash and grants of similar nature known by other names is very little except as to the origin and use of the land."

The grant in the case of *Klub Ali Hussain v. Syf Ali* (1) was also described in the firman as the madad mash grant to Mullah Faquiruddin, but it was nevertheless held to be a public endowment. This interpretation was put on the firman in the case of *Asheeroodeen v. Sreemutty Drobo Moyee* (2). In the case of *Abdulla Sahib v. Hyder Beg* (16) a grant to an individual who was servant of a mosque for the mosque was held to be public trust. I have already said that the grant was originally made to Shah Naji-muddin. It was renewed not in favour of his natural heir but in favour of his successor-in-office as sajjadanashin of the Moulanger Khankah. Part of the expenditures (naubat nawaz) was imposed upon the khankah by the grantor himself and the grantee Shah Gholam Moula is being described not in his individual capacity but as a successor (sajjadana-shin.) There is nothing in the grant from which it can be inferred that the expenditure mentioned therein represents a mere pious wish. I therefore hold that the objects of expenditure mentioned are the objects for carrying out which this grant was made.

Sir Abdur Rahim has laid much stress upon the fact that a provision for naubat nawaz (drum-beaters) cannot be the subject-matter of a valid wakf. This is so, if the drum-beaters are detached from the institution; such a provision by itself does not come within the scope of the Mahomedan law. But I have shown that the drum-beaters in this case are the drum beaters attached to the khankah, and I have shown the object of having them. They are the necessary paraphernalia of a khankah of some schools of Sufis like an organ for a Christian church. I have shown that according to the evidence of the defendant's witness himself the drum-beaters perform an important function "Naubat" is played four times a day and on important occasions. Admittedly "warid sadir" and "madad mash" for the sajjadanashin are not valid objects of wakf, as well as maintenance of a khankah.

(16) [1919] 51 I. C. 42.

(4). In *Jugatmoni Chowdrani v. Rom-jani Bibee* (17) the Calcutta High Court held the essentials of a valid wakf to be these: an appropriator must destine the ultimate application of the income to the objects not liable to become extinct; secondly, the appropriation must be at once complete; thirdly, there must be no stipulation in the wakf for sale of the property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity must be a necessary condition. In my opinion all the conditions are fulfilled in the present case. Sir Abdur Rahim attacked this grant on the following grounds. He contended that in the grant in question there is no ultimate reversion to charity; the property has not been tied down and, as the descendants of Shah Gholam Moula may become extinct or the khankah itself disappear the object is not a perpetual one. True it is that perpetuity is a necessary condition; but according to the acknowledged and accepted view it is not necessary to mention it at the time of the dedication: in other words, though all the jurists insist that the property should be dedicated permanently and the right of the donor therein parted with for ever, according to Abu Yusuf it is not necessary that the word "abad" (perpetual) should be mentioned or that the object in favour of which the dedication is primarily made should be of a continuing and permanent character. According to him when the dedicator has named a purpose liable to failure, even then the wakf is valid, and after failure of the object the property will be for the poor though they are not named. Now in this particular case it is obvious that the grant was perpetual.

The grant itself uses the word "ba farzandan" or "generation after generation." This being the law, I have no hesitation in overruling this contention raised on behalf of the appellants. I have already held that provisions for Shah Gholam Moula and his family are valid objects of wakf as they were provided for not as individuals but as persons connected with the khankah. But assuming that these provisions do not come within the purview of the legal objects of a wakf, even then such a wakf will not be invalid. I have referred to the case of *Abdur Rahim v. Narayan Das*

(17) [1834] 10 Cal. 533.

Aurora (8) where a mixed wakf was held to be valid : see also *Bazlul Ghani Mia v. Adak Patari* (18). In *Muthu Kana Ana Ramadhan Chettiar v. Vava Levvai* (6) the High Court of Madras held that a gift by way of wakf partly for valid charitable purposes and partly for the donor's heirs will not be void because the latter is not a legal purpose of a wakf. The wakf will be valid and the whole income will be devoted for the valid purposes. When this case went up to the Privy Council (7) the Lord Chancellor delivering the judgment of their Lordships of the Judicial Committee observed :

"The paramount purpose of the grantor was evidently to provide for all the needs of those charities up to the limit of the trust funds the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum that is given to the family."

I shall show later that in this case it is the residue which has been left for the family of Shah Gholam Moula. Sir Abdur Rahim however contends that no proportion between charity and noncharity having been fixed either in the earlier grant of Alivardi Khan or in the later confirmations of the East India Company, the wakf is void for uncertainty. I have said more than once that in my opinion the provisions for Shah Gholam Moula and his family are charitable and religious purposes ; but assuming they are not, the fixing of a proportion is not necessary. It was considered in the two Madras cases above referred to, and both the High Courts of Madras and the Privy Council decided that this did not militate against the property being a wakf. The Madras High Court held that the fact that the donor did not direct the proportion in which the income should be divided between charities and his heirs who were appointed trustees will not raise a presumption that he intended the heirs to take the whole. It must be presumed that charities and his heirs should benefit equally. The Privy Council did not go so far, but held that the trustees were bound within the limits of the funds to make reasonable and proper provision and if they failed to do so they would be set right by a proper tribunal. A wakf is not invalid if the proportion of appropriation between several objects is not specified: *Makhtachar Rahman v. Faizur*

Rahman (19). This is exactly according to the English law on charities. The law is thus laid down :

"When a testator gives funds partly for objects which are charitable and partly for objects which either are not charitable or does not specify the proportion in which the funds are to be applied for the different objects, the Court will make an apportionment."

Again where a fund is given for several objects, some charitable and some non-charitable or illegal, there being a clear intention to devote some part to the charitable objects, if it can be ascertained what are the proportions to be attributed to the several objects, the Court directs an inquiry, but if from the nature of the gift it appears impracticable to fix the proportion or the proportion were to be in the discretion of the trustees, the Court divides the funds equally between the different objects : Halsbury's Laws of England, Vol. 4, paras 233, 237. I therefore hold that Ex. 30 creates a valid wakf.

Hitherto I have been dealing with the earliest grant, that for pargana Abhaipur. On the assumption of the Diwani by the East India Company this grant of Alivardi Khan was confirmed by them under a sanad (Ex. U). This sanad also starts with the words "Moula Karim" discussed above. While giving the details of the property, it describes them almost in the same manner as the sanad (Ex. 30). Great stress is laid on the wording in this sanad which as usual is an order on the Revenue Officer of the pargana:

"You should regard them (the heirs of Shah Gholam Moula) as mokhtar (malik of the said pargana)."

The learned District Judge has rightly pointed out that the word used is "mokhtar" (one having power) and not "malik." But apart from this, for whatever purpose the grant is made, its holder for the time being is, for the purposes of the Revenue Officers, a malik. They must deal with him as such. At about the same time another grant of Mustafanagar and other villages was confirmed by Ex. W which shows that before this confirmation Mustafanagar, etc., had also been granted by the Governor of Bengal to Shah Gholam Moula. The last few lines of this grant are important. They are:

"The said persons should make proper cultivation of the said village and, after payment of the istamrari mukarrari jama, utilize the

entire amount in defraying the expenses of the casual visitors and in meeting their own necessities and devote themselves to the prayer of God for the eternal welfare of the estate."

In the body of the sanad, among the expenses mentioned, are students, the fakirs (beggars), the casual visitors to the Maulanagar khankah. I do not propose to discuss these two confirmatory grants (Exs. U and W) in detail. What I have said above about Ex. 30 applies to these two grants with much more force and clearly indicates that the grants were wakf and not personal grants. In Ex. W the words "devote themselves to the prayer of God" obviously refer to the necessity of relieving the sajjadanashin from secular burdens and thereby enabling him to devote himself to the works of a sajjadanashin which as head of the khankah he was expected to do. These three documents, namely, Exs. 50, U and W, are the only grants relating to the property in question and they prove wakf.

Let us now examine the usage in respect of this property and contemporaneous expositions of the grants as established by evidence. Fortunately the parties are not at variance about the facts. The controversy is as to their effect. Shah Gholam Moula had obviously been in possession of Pargana Abhaipur in revenue-free grant and Mustafanagar, etc., as istamrari mukarrari. On 18th Ramzan 1190 A. H. Hizri (7th November 1776) he executed what is described as a werasatnama (Ex. 30). An old copy of this is before us, and though damaged in places the operative clauses are clear. We found the original translation to be unsatisfactory and directed it to be retranslated. We have used it, and a copy of it is attached to this judgment. The document describes the children and grandchildren the said Shah had and then goes on to say that the balance (of his property) remaining after spending the produce thereof on sadabrat (daily alms) at Maulanagar khankah and on casual visitors and drum beaters, etc., should after him be divided into eight shares; and then it describes who the recipients of these eight shares were to be. It should be noted that what he willed to be distributed was not the corpus of the property but the income thereof left after meeting the religious and charitable expenses.

This document is relied upon by both the parties.

The appellant contends that Shah Gholam Moula treated this property as his personal one and distributed it among his descendants. They rely upon the words "which are owned and possessed by me at present," while Mr. Khurshaid Husnain on behalf of the respondent contends that if the property was not wakf from before, Shah Gholam Moula created a wakf by this instrument. In my opinion neither of these contentions can be accepted. Shah Gholam Moula neither treated the property as his own or dealt with it as such, nor is there any indication in this document that he was thereby creating a wakf. Had it been so it would have been a mixed wakf which I have shown is valid. Even if it were a wakf for his family alone it would have been valid now, but it would not have been a public trust. In this document there is however no indication that he was creating a wakf. He called this document a werasatnama. It is however clearly a trust, and I shall deal with this aspect of the case later on. On the other hand the contention of the appellant, that he was treating it as personal property, is untenable. No doubt the words "owned and possessed" are mentioned, but they are loose expressions. It only means that the properties were in possession and control of Shah Gholam Moula. He was doing nothing more than ensuring that after his death the arrangement for the expenditure of the income of the property should be carried on as it was carried on in his lifetime, namely, that the charitable expenses should be met first. It seems that he had two grandsons from a predeceased son, and he was anxious that after him they might not be left out from the maintenance and the sajjadanashin for the time being may not appropriate the whole thing himself. He says:

"The balance of the income thereof [after meeting the expenditure on sadabrat, (daily alms) at Moulanagar and on khankah and on casual visitors and on naubat players, establishment and Court expenses] will after me be divided into eight shares."

This is exactly what was indicated in the original grant (Ex. 50) and the two confirmatory grants (Exs. U and W). Had the property been the private property of Shah Gholam Moula the property itself would have been divided and

not the balance of the income which is left after meeting all the charges on religious and charitable heads. Sir Abdur Rahim contends that the assignment of the income is tantamount to an assignment of the corpus. He relies upon the case of *Hemangini Dasi v. Nobin Chando Ghosh* (20) for the proposition that the gift of share of rents and profits amounts to a gift of the share in the corpus of the estate ; but in the case before us there is no gift or devise of a specific share of the rent or profit of the property. What is devised and distributed is what remains after meeting the expenses enumerated. This can in no sense be taken to be a distribution of a specific share of the rents or profits of the property. The balance may dwindle down to nothing as the expenses on charity may increase. The proposition that an assignment of the income means an assignment of the corpus is not of a universal application. It depends upon the terms of the grant and its construction : see *Shookmoy Chandra Das v. Manohari Dassi* (21), which was upheld in *Shookmoy Chandra Das v. Monohari Dassi* (22) and *Rameshwar Narain Singh v. Riknath Koeri* (23).

It appears that after Shah Gholam Moula some trouble arose as to the manner in which the property was to be managed and as to the right of the descendants of Shah Gholam Moula in it. They executed an agreement dated the 9th Ramzan, 1206 Fasli, corresponding to 15th February 1799; Shah Gholam Hussain, son of Shah Gholam Moula, was at that time the sajjadanashin. He is described therein as mukhtarkar (manager) and not a sharer or proprietor (Ex. Z44). This document is relied upon by the appellants, but there is nothing in it to indicate that the properties were dealt with as private properties ; rather it shows that they were treated as endowed properties and an arrangement for their management was being arrived at by the various persons concerned. I have shown above that the two confirmatory grants of the East India Company were made: one relating to Pargana Abhaipur in 1780 and the other relating

to Mustafanagar in 1787 and this arrangement was arrived at shortly after the second one. The appellant's contention cannot be accepted. Gholam Hossein was a sharer to the extent of about a fourth because according to (Ex. 30) he was to get two shares out of the eight shares in which Shah Gholam Moula divided the remainder of the income left after defraying all the charitable and religious expenses but still he is described as mukhtarkar.

Then there are various rubkars of the Collectorates of Bhagalpur and Monghyr. The learned District Judge has dealt with them in detail and I do not wish to traverse the same ground again. Suffice it to say that in none of these proceedings was there ever any claim made that the properties were the personal properties of the maintenance holders or "share holders." I may mention that much stress has been laid upon the use of the word "shareholders." To my mind this does not show anything. They were in fact shareholders of the residue and this will not make them proprietors. However the result of the examination of the various rubkars referred to by the learned District Judge in his judgment is that from the time of the death of Shah Gholam Moula up till now the admitted position has been that the property was managed by a sajjadanashin and manager who was elected by the persons interested in the distribution of the remainder ; and he managed the property, met the expenses on religious observances and charities and distributed the remainder among the descendants of Shah Gholam Moula pro rata. Reliance has been placed upon the fact that these alleged rights to receive the maintenance or the remainder have been the subject-matter of some transfers.

I have examined these documents. Apart from the question of validity of such a transfer in none of them has a share of the property itself or of the corpus been transferred, but only the right to receive a share of the surplus. Mr. Kurshaid Husnain contends that such a transfer is illegal. This is beside the point. The question is whether these transfers in any way militate against the property being a wakf. The distribution of the remainder among the descendants of the muttawali is not illegal and is permissible. Such cases have arisen in the

(20) [1882] 8 Cal. 788=11 C. L. R. 370.

(21) [1881] 7 Cal. 269=8 C. L. R. 473.

(22) [1885] 11 Cal. 684=12 I. A. 103 = 4 Sar. 639 (P. C.).

(23) A. I. R. 1923 Pat. 165=67 I. C. 451.

past. In Macnaghten's Principles and Precedents of Mahomedan law, Ch. 9, we find that though the partition of the endowment itself is illegal, a partition of the profits arising therefrom is allowable (case 3). The profits also of endowment belong of right to the heirs and should be distributed amongst them; but the law of inheritance does not obtain in this species of distribution, the heirs taking per capita. Nor will the portion of one be greater than that of another supposing them to be of equal knowledge and piety. This doctrine is maintained in the Hedaya (case 7).

The fact that in this case the division has been per stirpes and not per capita does not affect the question. This is a matter between them inter se and will not in any way prejudice the charitable and religious character of the endowment. As I have said before the rubkars show that the sajjadanashin and manager and the so-called shareholders were before the revenue authorities several times and on every occasion they clearly admitted that the income of the properties was to be employed in the first instance in meeting the charitable and religious observances of the khankah and the balance to be utilized and enjoyed by them. Occasions have arisen in which outsiders for instance, one Sham Singh, charged them with misappropriation and breaches of trust. The Collectors and other revenue authorities summoned them and investigated the matter and found that the charities were being properly looked after. In one of them (Ex. Z-3) it is clearly mentioned that the expenditure on charities was at that time found to be more than half of the net income:

"From this it is (torn) clear that out of the entire proceeds of the said pargana after paying the village expenses and the salaries of the servants connected with the collection of rent (torn) which is one of the necessary expenses, more than half of it is applied towards meeting the expenses of the khankah as given in the ~~manads~~ and the balance which is less than one-half according to the account is spent on meeting necessary expenses and madad mash of all the cosharers whose number is very large."

The defendant's grandfather Shah Yasin was the sajjadanashin. When he died the defendants' father was an infant. So instead of him Shah Alay Ahmad was appointed sajjadanashin and manager. Shah Yasin's widow claimed that her infant son should be appointed the sajjadanashin. There was a civil suit

which ultimately went up to the High Court: vide Bibee Sayeedan (on behalf of her infant son) *Shah Mahomed Wasein v. Syud Allah Ahmed* (24), the case referred to the present khankah Mt. Sayeedan admittedly being the grandmother of the present defendant and Shah Alay Ahmad was the de facto sajjadanashin at that time. Bibee Sayeedan lost the case. The dispute there was a succession versus election. I am not using this judgment of the High Court as proof of any particular fact decided therein. But it is admissible in evidence to show that at that time the question of the private nature of the property could have been raised but was not raised. The dispute was about the office of the sajjadanashin and the managership of the property. The whole contention of Sir Abdul Rahim has been that the property is a private one liable to division among the heirs and the expenditure on charities is at the option and sweet will of the sharers; he contends that they may spend any amount they like or if they choose, they need not spend anything. It was, he explains, for the convenience of the management that they by a compromise (Ex. Z-44) mutually agreed to have a sajjadanashin or a manager appointed. This claim of the appellant is not supported by a word in the record. On no occasion has anybody harring, the defendant, ever thought fit to claim that the properties were private. All the documents show that the expenditure on charities was considered obligatory and that the keeping up of a sajjadanashin or manager did not depend upon the will of the shareholders.

Much stress has been laid upon the fact that the properties and the institution were not taken charge of under Regn. 19 of 1810. That Regulation was enacted with a view to the proper management of wakfs, debuttars etc., and the superintendence and control of the institution were vested in the Board of Revenue, the Collectors of the districts being appointed local agents. Sir Abdur Rahim has contended that the authorities did not bring this institution under their control, as contemplated in the regulation, and that therefore it should be presumed that there was no trust for religious and charitable purposes. On the other hand the respon-

dents contend, relying upon the various rubkars exhibited in the case, that as a matter of fact the institution was brought under the control of the Board of Revenue under that Regulation. The Regulation, as I have said, vested the Board of Revenue with the powers of control and the Collector of the district was appointed the local agent. The Regulation was passed in 1810 and ceased to be in force after the passing of Act 20 of 1863. The rubkars (Exs. 32 to 39) filed on behalf of the plaintiff and (Exs. X, Y, Z to Z-7) filed on behalf of the defendant refer to the intervening period. They show that the khankah and the properties were on many occasions the subject-matter of investigation and inquiries by the Collector and his subordinates and on some occasions reports were sent even to the Board of Revenue. Mr. Khurshaid Husnain contends that all these indicate that though the authorities did not formally and directly assume the control of the estate, they from time to time looked into the management and satisfied themselves that everything was all right.

First of all no authority has been placed before us to show that if an institution was not taken charge of under the Regulation, it is to be presumed that it was not a public endowment. Certainly if it was taken charge of, it will be almost conclusive proof of the fact that it was a public institution. But the converse is not correct. Secondly, as the learned District Judge has pointed out, the authorities were not very consistent in their interpretation of the Regulation. I find in the rubkar (Ex. 10) that the Collector was of opinion that as the descendants of Shah Gholam Moula were receiving maintenance out of the surplus income of the properties, the Regulation did not apply. This rubkar shows that one Shyam Singh filed a petition informing the Collector that the income of the properties was being misappropriated and on inquiry held, it was ascertained that the income was being applied to the expenditures provided for in the various sanads. The sajjadanashin was called upon to produce three years' account-papers. The last portion of the rubkar runs thus:

"Accordingly on a perusal of the Council's sanads dated 19th February 1780 and the deposition of the said Shah it has been ascertained

that the entire pargana aforesaid was granted for defraying the expenses of casual visitors, drum-beaters and meeting the necessary expenses, that is, the personal expenses of the aforesaid persons. In the circumstances I am of opinion that Regn. 19 of 1810 is not applicable to the said pargana and the allegations of Shyam Singh are quite false."

On the other hand I find from (Ex. Z-3) that the Deputy Collector of Monghyr was of opinion that the regulation did apply to the estate in question. The report is in these terms :

"However we are of opinion that the Regulation is applicable so far as the expenses of the khankah appertaining (torn) are concerned. But as the defendants are meeting the aforesaid expenses which fact has been proved as mentioned above, and as there is not the least doubt about it, it is not in any way liable for interference and reiterated inquiry on the part of the Government."

Thirdly it seems to me that on each occasion when the matter came up before the Collector who was a local agent under the Regulation and on inquiry it was found that the institution was being well managed and that there was no mismanagement or abuse, he did not like to interfere in the details of the management. But I fail to understand under what provisions of law these inquiries were being made if they were not under Regn. 19 of 1810. It also appears that on the occasion of the appointment of the sajjadanashins the Board of Revenue was informed and its orders were obtained. Ex. 36 shows that under the orders of the Board of Revenue the Collector visited the institution, called for accounts and submitted a report to the Board. Ex. 39 shows that the Board of Revenue passed orders as to the sajjadanashinship of the estate. From all these my conclusions are that though the estate was not formally taken up under the regulation some sort of control was being exercised, and that could only have been under the powers vested in the Board of Revenue and the local agent under that regulation. I have said that the learned District Judge has pointed out and I agree with him, that from these proceedings it is quite clear that the action of the authorities was not very consistent. This will not in any way show that the property was not a public charitable institution at least so far as the expenses of the khankah were concerned. On the whole therefore I hold that the properties in dispute are wakf properties or at any rate, they are pro-

properties burdened with obligation in favour of the public and, by usage, they have been treated and dealt with as such. The usage can be taken into consideration in deciding whether there is trust. A trust of public nature was decided on the basis of usage in the cases of *Kumaraswamy Asary v. Lakshmana Goundan* (25) and *Court of Wards v. Ilahi Bakhsh* (26); see also the observations of Chamier, J., in *Puran Atal v. Darshan Das* (27) which were upheld in *Puran Atal v. Darshan Das* (28).

Hitherto I have discussed whether the property is wakf under the Mahomedan law and I have held that it is so; but for the purpose of the suit however it is only necessary to find whether the properties are trust for public, religious or charitable purposes and come within the purview of S. 92, Civil P. C. The words "trust" and "trustee" have not been defined in the Code and, in my opinion, the words as used in S. 92 have not been used in any technical sense of the term as used in English law or in the technical sense in which the word "wakf" is used in Mahomedan law. The words have been used in the ordinary sense. "Trust" in the most enlarged sense in which that term is used in English jurisprudence may be defined to be an equitable right, title or interest in the property, real or personal distinct from legal ownership thereof and "trustee" is:

"A person holding the legal title of property under an express or implied agreement to apply it and the income arising from it to the use and for the benefit of another person: Story."

Under the English conception of the term, trust conveys the idea of two estates and two parties: a legal estate vested in the trustee and an equitable estate vested in the cestique trust or beneficiary. Obviously therefore had the word "trust" been used in the Code in the technical sense of the English jurisprudence the section would have been inapplicable either to wakfs of the Mahomedan law or to debuttars of the Hindu law. But it has been held in a long series of decisions that this section does apply to Mahomedan wakfs and to Hindu debuttars where there is no conception of

two estates and two ownerships. What is required for the purposes of S. 92, Civil P. C., is to find whether or not there is a property burdened with obligations for public purposes of a charitable or religious nature. It will apply in all cases, whether wakf or not, where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature. The word "trust" as used in Act 14 of 1920, was the subject-matter of judicial interpretation in *Syed Ali Hussain v. Bibi Akhtari Begum* (29) by Kulwant Sahay and Macpherson, JJ. Their Lordships held that the word was not used in the technical sense of English jurisprudence and applies to wakfs. That Act is, if I may say so, a supplement to S. 92, Civil P. C., and the procedure prescribed in the Act may be the foundation of a suit under this section of the Code. It has however been contended that a trust apart from wakf is unknown in Mahomedan law and that the grant in question having been made by a Mahomedan ruler, if it is not wakf it cannot be held to be a trust.

I am unable to uphold this contention. If this means that a trust in the technical sense of English law (that is, a double estate: one legal and another equitable) is unknown in the Mahomedan law it is so. But a trust in the sense of being an obligation attached to the ownership of the property is known and recognized by the Mahomedan law. Anglo-Mahomedan jurists have used the word "trust" in respect of wakf. In his well-known treatise on Mahomedan law, the Hon'ble Mr. Ameer Ali (latterly a member of the Judicial Committee) has freely applied the word "trust" to a wakf. It is difficult of course for a technical term representing a very complex notion in one system of law to have an exactly equivalent connotation in another system of law. Mahomedan law of course does not recognize the double ownership and the double estate, an equitable right enforceable by a particular Court is unknown in the Mahomedan law. But devoid of this technicality, "wakf" is a trust in the wider meaning of the term. Trust apart from wakf is recognized by the Mahomedan law and is known as "amanat." Reliance has been placed on

(25) A. I. R. 1930 Mad. 549=128 I. C. 504=52 Mad. 608.

(26) [1912] 40 Cal. 297=40 I. A. 18=17 I. C. 744 (P.C.).

(27) [1911] 11 I. A. 166 (P.C.).

(28) [1912] 34 All. 468=14 I. C. 698.

(29) A. I. R. 1931 Pat. 354=124 I. C. 417=10 Pat. 506.

the dictum of Karamat Husain, J. in *Puran Atal v. Darshan Das* (27) for the proposition that trust apart from wakf is unknown in the Mahomedan law. This view was however not accepted by his Lordship's colleague Chamier, J., (afterwards Chief Justice of this Court) and it was the view of the latter which ultimately prevailed in the Court of appeal in *Puran Atal v. Darshan Das* (28). With my profoundest respect to the former learned Judge I must point out that the view on the law of wakf as enunciated by him is opposed to a large number of judicial decisions of this country which I have referred to above. Reference has been made to the observations of their Lordships of the Privy Council in the case of *Vidya Varuthi Thirtha v. Balusami Ayyar* (11). In my opinion their Lordships did not lay down that a trust apart from wakf was not recognized by the Mahomedan law. That was a case in which the applicability of Art. 134, Lim. Act, was under consideration and their Lordships held that in Mahomedan wakfs and Hindu debuttars the property is not transferred to a trustee and therefore the article did not apply. No doubt their Lordships remarked that the charitable dispositions of Mahomedans and Hindus did not manifest themselves in creating trusts but in creating wakfs and debuttars.

Their Lordships were in that case using the word "trust" in the English sense of the term and that judgment is no authority for the proposition that a trust is unknown to Mahomedan law. On the other hand trusts apart from wakfs even for charitable and religious purposes have been recognized by our Courts: vide *Puttoo Bibee v. Bhurrit Lall Bhukut* (30). In the case of *Bishen Chand Basawat v. Nadir Hossein* (31) their Lordships of the Privy Council applied the principles of wakf to a partial trust. There a property burdened with obligation in favour of religious and charitable objects was sought to be sold in execution of a decree. The High Court of Calcutta held that it could not be done. An argument was advanced from the Bar that the property could be sold subject to the obligation. The High Court observed as follows:

"Nor is it essential to decide whether the property became what is known technically as wakf... The Subordinate Judge finds and we think rightly that the deed created a trust for certain specific purposes. This implies the trustee for the time being entitled to hold the property subject to the performance of the duties charged upon it."

Their Lordships ultimately held that the property could not be sold. A trust for private purposes was upheld under the Mahomedan law in the case of *Umjad Ali Khan v. Mohumdee Begam* (32). The distinction between an English trust for charitable and religious purposes and a Mahomedan wakf is more historical than legal. According to the accepted doctrine wakf signifies the extinction of the proprietor's ownership in the thing dedicated and the detention of the thing in the implied ownership of God in such manner that the profits may revert to and be applied for the benefit of mankind: see Baillie and Grady's *Hedaya*. According to the English doctrine historically viewed a trust involves a double ownership and two estates. Practically it involves single ownership with an obligation annexed thereto. The English conception of trust is that while the legal ownership of the property vests in one person the equitable ownership vests in the beneficiaries or what is called *cesti que* trust and this equitable right is enforced by the Courts of equity. The conception of wakf according to the accepted doctrine that the property is vested in God is a later development. The Right Honourable Mr. Ameer Ali in his preface to the second edition of *Mahomedan Law* says as follows:

"In some places I have rendered the term 'wakf' as trust in others as dedication or consecration... Properly analyzed it will be found that the word 'wakf' combines all the ideas conveyed by these different expressions. The Mussalman law holds that there can be no milk (property) without a malik (proprietor) that all property owned by human beings is God's free gift to them and that when a man creates a wakf he transfers the milk (the ownership in the substance of the thing) to the Almighty on the condition that the usufruct should be applied for the benefit of his creatures whoever they may be. It will thus be seen that the word combines the elements of trust dedication and consecration. From one point of view God is the owner of the substance the recipient of the benefaction being His creatures. In another sense, he is the trustee on his behalf the muttawali being a mere manager."

(30) [1868] 10 W. R. 299.

(31) [1887] 15 Cal. 329=15 I. A. 1=5 Sar. 112 (P. C.).

(32) [1867] 11 M. I. A. 517=10 W. R. 25 (P. C.).

The conception of property being vested in God was evolved a century or so after the death of the Prophet. A full discourse will be found in Abdur Rahim's Mahomedan Jurisprudence, p. 304. The jurists differed as to the ownership of the property. According to Imam Abu Haneefa the ownership of the property even after dedication continues with the wakif or appropriator and the devoting or appropriating of its profits or usufruct in the charity on the poor or other good objects is in the manner of "areeut" or commodate loan but not so as to be obligatory on the appropriator and therefore according to him he may revoke the appropriation or sell the subject of it. There are two ways in which this may be made obligatory: one is by the order of the Judge and the other is by the words of bequest. According to Imam Mubammad the ownership remains with the dedicator till a trustee is appointed and then vests in God. According to Aboo Yusuf it becomes vested in God as soon as a dedication is made. It is submitted that all this is nothing but a legal fiction. Ordinarily it looks rather strange that a mortal human being transfers a property to God. The legal fiction is brought into play in order to explain where the ownership of the property rests after once a dedication is made. However, the doctrine propounded by Abu Yusuf is the Hanafi law as is at present administered. The Hanafi jurists have not accepted the doctrine enunciated by Imam Abu Haneefa. The Shia lawyers hold that the corpus after dedication becomes vested in the beneficiaries themselves. It is again, I submit, a legal fiction; otherwise it cannot be said that the beneficiaries become the owners of the property in a sense in which the word "ownership" is used in law. A similar legal fiction has been introduced by the Hindu law-givers. According to them debuttar becomes the property of the idol who has been held to be a juristic person under perpetual tutelage of the shebait.

From what I have said above it is clear that different systems of law have different explanations as to the legal ownership of a property dedicated for public, religious or charitable purposes. English law recognizes two estates: one legal and another equitable; Imam Abu Haneefa holds the ownership continuing in the appropriator, his two disciples

hold the ownership to be in God, the Shias in the beneficiaries, and the Hindus in the idol. But whatever may be the difference in the conception of the legal ownership of the property, there is no differences whatsoever that the beneficiaries have a right in the property which the Courts of law or equity will enforce.

The distinction of legal and equitable estate is of no importance now. The same Courts exercise both jurisdictions. The difference in the law of trust and wakf as to the transferability or otherwise of the property is also due to this difference in the conception of the ownership of the property. As under the English law the legal ownership is vested in a human being, he can transfer it subject to the obligation placed upon it. Under the Mahomedan law, while the ownership is vested in God, the muttawali is His manager, he cannot transfer the corpus of the property. A wakf in the terms of the English law is a trust and if I may be permitted to say so the legal ownership is vested in God and the equitable ownership in the cesti que trust; and as nobody can transfer the property vested in God the wakfs are not transferable. Be that as it may, there is no question on the authorities that the properties in suit are trust properties in the wider sense of the term. Even if we assume that the grants of the rulers of Bengal did not create a wakf and that the properties were the personal properties of Shah Gholam Moula the wasiatnama (Ex. 30) obviously creates a trust in favour of charities. I have already shown that a transfer burdened with trust is recognized in the Mahomedan law. It has been contended that at the most the property can be taken as a private property burdened with certain obligations. Reliance has been placed upon the case of *Dalrymple v. Khoondkar Azezul Islam* (33). In that case the only question decided was that if the office of the muttawali is hereditary the muttawali has power of granting even a perpetual lease. In this case we are not concerned with the power of the muttawali or whether the office of the sajjadanashin is hereditary. In the case of *Shah Mahomed Wasim v. Syed Allah Ahmad* (24) it was held that the office was not hereditary but was based upon election, and it is

(33) [1853] 14 S. D. A. 586.

not the defendant's case that the office is hereditary. Had it been so, he would have been nowhere. Nor are we concerned in this case with the right or powers of the sajjadanashin. That case in no way affects the question of this property being a wakf or a public trust.

It was further contended that it was a conditional grant to Shah Gholam Moula, and whether the condition of the grant is being fulfilled or not is a matter between the grantor and the grantee and the plaintiffs as representing the public have no right to interfere or claim the preparation of a scheme. Mr. Hasan Jan, who gave the final reply on behalf of the appellant, contended that there was no privity of contract between the grantee and the public. The contract was between the grantor and the grantee and the public did not come in at all. In my opinion this argument is not entitled to any serious consideration. If this is to prevail, no public trust can come in within the purview of S. 92, Civil P. C. In any trust for the benefit of the public there is no privity of contract between the grantor and the grantee on the one hand and the beneficiaries on the other: the beneficiaries come in because they are beneficiaries.

It has been contended on behalf of the respondents that the defendant having himself come in possession of the property as a trustee, cannot now take up the position that they are his private properties. Reliance has been placed upon the cases of *Srinivasa Moorthy v. Venkata Varada Aiyangar* (34) and *Vaidyanatha Ayyar v. K. Swaminatha Ayyar* (35). I agree that the defendant is estopped from taking up the position which he has taken in the present suit. The khewat of the Record of Rights and the Register D, maintained under the Land Registration Act show the properties to be trust. The Record of Rights has a presumptive value and has not been rebutted.

I now take up the question of the maintainability of the suit. Sir Abdur Rahim's contentions are that (1) even if the property is wakf or trust, it is of a private nature and S. 92 does not apply; and (2) if it is private property burdened with obligations in favour of

the public, S. 92 has no application. After what I have said above, I do not think it is necessary to consider this point. It is settled law that the word "public" means a section of the public, and it cannot be disputed that provisions for maintenance of khankahs and for distribution of alms and charities, etc., are objects of a public nature, and S. 92 has full application in such cases. Most of the cases referred to above are cases of khankahs and shrines, and no question was raised that they were not trusts of a public nature. Reliance has been placed upon the case of *Delrus Banoo Begum v. Asgur Ali Khan* (36) and the decision of their Lordships of the Privy Council on appeal reported in *Ashgar Ali v. Delroos Banoo Begum* (37). But there the imambara in question was of a private character and the case has been distinguished in the case of *Ram Charan Lal v. Fatima Begum* (38). Reliance has also been placed upon the case of *Abul Hasan v. Saiyed Aziz Ahmad* (39). There their Lordships expressly refrained from deciding whether the property was or was not a wakf, but they held that it was not a public trust. There is nothing in the report to show that any section of the public was in any way to be benefited by that institution. On these grounds I hold that it is a wakf of a public nature and S. 92 is applicable.

Sir Abdur Rahim has further argued that the suit is bad for defect of parties. He contends that all the maintenance holders (commonly known as shareholders) ought to have been impleaded in the suit. I see no force in this. First of all it is a suit of a representative character and on the findings which I have arrived at the shareholders are no more than beneficiaries under the trust, the plaintiff having instituted the suit on behalf of all the beneficiaries. But Sir Abdur Rahim contends that the decision of the question whether it is a trust of a public nature cannot be arrived at in the absence of the shareholders who claim the property to be a private one. In the first place there is nothing to show that any descendant of Shah Gholam Moula, except the defendant, has ever claimed the property to be a

(34) [1911] 34 Mad. 257=11 I. C. 447 (P.C.).

(35) A. I. R. 1924 P. C. 221=82 I. C. 804=51 I. A. 282=47 Mad. 884 (P. C.).

(36) [1875] 23 W. R. 453=15 Beng. L. R. 167.

(37) [1877] 3 Cal. 324 (P.C.).

(38) [1915] 42 Cal. 933=27 I. C. 442.

(39) A. I. R. All. 394=25 I. C. 661.

private one : rather, whenever anyone of them appeared before any public authority, the obligation of the trust was freely and ungrudgingly admitted. Apart from this in a suit under S. 92, Civil P. C., only the trustee is a necessary party and not those who may be in possession of trust properties even adverse to the trust: *Makhlachor Rahman v. Faizur Rahman* (19). At any rate the plaintiff was not bound to implead those persons who do not put forward any claim adverse to the trust. The property is in possession of the defendant and the case in my opinion can proceed against him. I therefore hold that the suit is maintainable. Then it is contended that as there is a prayer for the declaration of the disputed properties to be a trust, S. 92, Civil P. C., does not apply. It is argued that the section only applies when the trust is admitted and not when the very existence of the trust is in dispute. There is no force in this contention either. When there is a breach of trust a suit for a declaration that there is a trust and for the preparation of a scheme or the removal of the trustee can only be instituted under S. 92 of the Code. Such a suit will not be entertainable if instituted as an ordinary civil suit. The learned District Judge has rightly held that the suit is maintainable and I entirely agree with him.

I now take up the question of the removal of the sajjadanashin. It has been contended that the sajjadanashin as the spiritual head of the institution is not removable. Reliance has been placed upon the case of *Ishtiaq Ahmad v. Saiyid Masood Ahmad* (40) and the observations of the learned Judge in the case of *Mohiuddin v. Saiyiduddin* (13), *Secy. of State v. Mohiuddin Ahmad* (41), and *Piran Bibi v. Abdoor Karim* (12). Except in the case of *Ishtiaq Ahmad v. Syed Masood Ahmad* (40) it has nowhere been laid down that a sajjadanashin is not liable to be removed however wicked and undesirable he may be. With my profoundest respect to the learned Judges of the Allahabad High Court who decided that case, I am unable to agree with this view. Cases may be conceived in which a sajjadanashin or a spiritual head of a Hindu institution, say for instance, a mohunt of a sangat, may so behave him-

self that his very connexion with the institution may be repulsive to the general public and may amount to desecration of the sacred places; I see no reason why the Courts cannot interfere in such cases. On the other hand I entirely agree (if I may say so) with the observation of Abdur Rahim, J., in the case of *Sajjada Shah Mahamad Yusuf v. Shaw Habit* (10), that a sajjadanashin is removable if a proper case be made out. Cases of the removal of the mohunts are very numerous: see *Subbaroya Chetti v. Subramania Iyer* (42), *Zamindar of Kallahasti v. Ganpathi Iyer* (43) and *Raja Peari Mohan Mukerji v. Monohar Mukerji* (44). No doubt the Courts have not to apply the principle of a muttawali to a sajjadanashin. By him the spiritual line of the founder is continued. People become his disciple mostly not so much on account of his personal qualifications but on account of the fact that by becoming his disciple they are connecting themselves in a spiritual link with the founder saint. Cases of mismanagement or incapacity will not ordinarily be sufficient to remove a sajjadanashin as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property but that he is of such a low morality that his continuance as the superior of the sacred shrines and institutions is repugnant and undesirable. I do not wish however to discuss this matter in detail as I propose to allow the defendant to continue as sajjadanashin of the institution and to deprive him only of the management of the property. I shall take up this matter later on.

Coming to the facts justifying the removal of the defendant I entirely agree with the findings of the learned District Judge. The alleged acts of mismanagement, immorality and dishonesty of the defendant have been enumerated in para. 22 of the plaint. They are 18 in number. The learned District Judge has found some of them proved and some not proved. The acts of malfeasance and misfeasance which have been proved against the defendant and which have not been properly explained by the appellant's advocates before us mostly, if

(42) [1918] 48 I.C. 833.

(43) [1916] 48 I.C. 897.

(44) A. I. R. 1922 P. C. 235=32 I. C. 76 = 48 I. A. 258=48 Cal. 1019 (P.C.).

(40) [1909] 3 I.C. 508.

(41) [1900] 27 Cal. 674.

not entirely, relate to the management of the property. There have been one or two instances of neglect of duty if not of positive dishonesty (as for instance, not contesting the suit instituted by his father against the khankah in connexion with certain gardens). There are some acts of want of uprightness in maintaining accounts. Apart from this the defendant has adopted an attitude of obstruction. He put forward a claim that the property is a private one which none of his predecessors ever thought of doing. He himself in the former suit did not go the length of claiming the property to be a purely private one. He has withheld accounts from the Courts and the learned District Judge has rightly declined to accept his reasons for doing so. On all these grounds I think that he has rendered himself unfit to be allowed to continue as a manager of the institution. On the other hand charges of immorality have not been proved and taking into consideration the circumstances of the case I do not think a case has been made out for his removal from the office of the sajjadanashin. It has not been proved that he is leading a wicked life.

I do not for a moment wish to belittle the misdeeds of the defendant, but at the same time I must note that he was to some extent tempted to adopt the untenable position which he took in the trial of the suit and in this Court. He was elected a sajjadanashin in 1913. Nothing was alleged against him till 1922. In that year a suit under S. 92, Civil P. C., was instituted against him. His defence was that Shah Abdul Rasheed, the son of the late sajjadanashin Shah Sami Ahmad, who was a minor in 1913 and could not be elected as sajjadanashin on his father's death, having come of age wanted to regain the position which his father held. Whatever might have been the misdeeds of the defendant, I have reason to believe that the suit of 1922 was instituted more in the interest of Shah Rasheed than in the interest of the public. The suit was withdrawn as soon as the defendant came into terms with him and executed the ekrarnama (Ex. 1 in the case). Paras. 5 and 14 of this ekrarnama have not been printed in the paper book. We got them translated and a copy is attached to this judgment. The term on which the case was allowed to be dismissed was in effect that Shah

Abdul Rasheed would get Rs. 200 per month: Rs. 100 for the expenditure of maintaining the madrasa of which he would be placed in charge and another Rs. 100 by way of allowance and it was also stipulated that though Shah Abdul Rasheed would get these allowances, he would not be required to stay at Moulanagar. In fact the provision was that Rs. 200 per month would be handed over to Shah Abdul Rasheed to do whatever he liked with it. On the defendant agreeing to these terms the suit was dismissed. It is obvious that had the defendant been such a bad lot as he is painted now, the suit would not have been withdrawn on his executing the ekrarnama, the main object of which was to benefit Shah Abdul Rasheed. The defendant's case is that as this ekrarnama contained new terms contrary to the usage prevailing in the institution he had to cancel it. I have no hesitation in holding that the defendant was justified in cancelling this ekrarnama which in a way allowed Rs. 200 a month to a man holding no definite office in the institution.

It seems to me that the sajjadanashinship of this khankah has been an apple of discord practically throughout the whole history of this institution. Disputes and fights are apparent from some of the rubkars which have been filed in the suit. I have said that Shah Yasin, the grandfather of the defendant, was the sajjadanashin. On his death his son Shah Wasim, the plaintiff's father being an infant, one Shah Allay Ahmad was elected a sajjadanashin. There was a litigation up to the High Court. Shah Ally Ahmad was succeeded by his grandson Shah Sami. His term of office seems to have been rather peaceful. On his death the family of Shah Wasim again managed to capture the office and the defendant was elected. As soon as Shah Rasheed Ahmad, son of Shah Sami Ahmad, became of age, he wanted to get something out of the office which was formerly held by his father and managed to secure Rs. 200 a month by the ekrarnama (Ex. 1). During the litigation it is apparent that some of the account books of the defendant were stolen and then produced in Court to contradict the account filed by the defendant himself. In this litigation unfortunately there have been intrigues and counter-intrigues. The respondents

have laid much stress upon the falsity of the accounts. No doubt there are contradictions between the two sets of accounts: Exs. 3, 3-a, and 4 on the one hand and Exs. 5 on the other. But these account papers exhibited on behalf of the plaintiff have a history behind them. They were stolen from the office of the defendant by some of his disloyal servants and then produced in the previous suit to contradict the accounts filed therein by the defendant. After the dismissal of the suit they were taken back and have again been filed in this suit. One of the sets bears the initials of the defendant (S. M. K.). It is difficult to find out how far the defendant is responsible for it. The manner of this production makes one suspicious. The defendant is obviously an incompetent person so far as management of a zamin-dari is concerned and knows very little of accounts. These papers may be the outcome of a deep-planned design, as when one's subordinate are disloyal anything may happen. The clerks might have intentionally kept two sets of accounts to be used against the defendant. All this however can in no way be used as an excuse for the defendant for adopting the attitude which he has taken in this case for which I have held that he is unfit to continue as the manager of the property. But it has not been shown that he is a man of such a wicked character or loose morals as to necessitate his removal from the sajjadanashinship also. After all the office is based to some extent on the belief of the people, and I am of opinion that so far as the order of the removal of the defendant from the office of the sajjadanashin is concerned, it should be reversed. He was elected by the descendant of Shah Gholam Moula and there is nothing on the record to show that the majority wanted his removal. No doubt three of them have been examined as witnesses in the case, but in an institution like this there shall always be dissentient voices: all cannot agree to one man.

In the documents the head of the institution has been described as sajjadanashin and manager, and I see no objection in making provisions for separation of the offices. No doubt up till now both the offices were held by one and the same incumbent, but in preparing a scheme the Court is not bound to follow

either the terms of the grant, if any, or even the usage which has been in force so far: see *Prayag Doss v. Tirumala Sringacharlavaru* (45) and *Mahomed Ismail Arif v. Ahmed Moolla Dawood* (46). In the case of *Sujjada Mahamad Yusuf v. Shaw Habit* (10) cited above, the Madras High Court did separate the office of the sajjadanashin from that of the manager. Therefore, while upholding the order of the learned District Judge so far as removing the defendant from the managership of the property is concerned, I am of opinion that it is neither necessary nor desirable to remove him from the office of the sajjadanashin. This will however in no way affect the rights of the shareholders to remove him if they choose to do so in conformity with the scheme to be prepared, nor will it in any way interfere with the powers of the learned District Judge if he, for any future act of the defendant on a proper application made, to him decide to remove him.

There is another matter in which the decree of the learned District Judge requires some modification. This is in respect of the order about the taking of the accounts from the defendant. As sajjadanashin by election the powers of the defendant were more than that of a muttawali or trustee. The decisions which I have referred to above show that a sajjadanashin is not a muttawali and his powers of expenditure are wide, and as long as he keeps up the institutions in a fairly decent condition, he is not accountable to anybody. No doubt those decisions do not apply to the present case where the surplus after meeting the necessary expenses is to be distributed among the maintenance-holders; but nevertheless directing him to render accounts for the previous years without some limit will be a very complicated affair especially when there are indications on the record to show that at the time of the previous suit the account papers of the defendants were stolen and there is reason to believe that the plaintiffs in that case were to some extent privy to it. This being the state of affairs it will not be in the interests of justice if the defendant be now called upon to render accounts without some

(45) [1905] 23 Mad. 319=15 M. L. J. 133.

(46) A. I. R. 1916 P. C. 132=35 I. C. 30=43 I. A. 127=43 Cal. 1085 (P. C.).

limit being imposed upon it. On the other hand I do not want in any way to jeopardize the interests of the maintenance-holders who have been depending upon the allowances for the last one hundred and fifty years or more. The decree of the learned District Judge should in my opinion be modified in such a way as would confine the rendering of accounts only to ensuring that a reasonable amount has been distributed among the maintenance holders. If it is found that about half of the income of the estate has been distributed among the maintenance-holders no account of the remainder shall be taken from the defendant. This is the proportion roughly speaking which was being distributed among them. If on the other hand much less than that has been distributed, the District Judge will proceed to take accounts from the defendant for a period of three years prior to the institution of the suit and for the period of the pendency of the suit. The descendants of Shah Gholam Moula, commonly called shareholders, have been receiving the surplus of the income. I agree with the learned District Judge that these maintenance-holders should not be deprived of what they have been getting for the last 150 years. A provision to this effect fixing a proportion between the two classes of expenditure should be embodied in the scheme. I am not unmindful of the fact that a time may come when the amount to be received by a particular individual is so small and insignificant that it will be of no use to the recipient to receive it, and it will be contrary to the intention of the grantor to pay it; in other words, it will be too small to be called a maintenance. In that case the recipient may himself refuse to take it or the Court on a proper application made modify the scheme and apply the doctrine of cypres to such an amount. It is also necessary that the broad principles of the scheme should be embodied in the decree.

In view of the remarks I have made it is necessary that in lieu of the decree of the learned District Judge a fresh decree be prepared in this Court in the following terms:

(1) That it be declared that the Moulanagar khankah is a public, religious and charitable institution and that the properties appertaining to it mentioned

in Schs. 1-A and 1-B to the plaint are public trust properties primarily intended for the maintenance of the said khankah and for the maintenance of the charitable, religious and educational institutions attached to it and a full discovery of the trust properties shall be made.

(2) That a scheme be prepared for the management of the said khankah and the properties attached thereto; that it be declared that the religious, charitable and educational expenditures on the scale provided in the scheme are the first charge on the income of the said properties and the balance left is to be distributed among the descendants of Shah Gholam Moula in the same manner in which it is being distributed up till now.

(3) That the defendant be removed from the office of the manager of the properties attached to the institution, but will continue as sajjadanashin of the khankah till he is removed either in the manner provided in the scheme aforesaid or by the District Judge for any act of misconduct committed by him subsequent to this date.

(4) That till such time as the defendant continues to be sajjadanashin of the khankah a manager or muttawali shall be appointed in the manner provided in the scheme aforesaid.

(5) That if on account of death, resignation or otherwise the defendant ceases to be the sajjadanashin, the manager to be appointed under Cl. (3) shall also vacate office and a joint sajjadanashin and manager or a separate sajjadanashin and a separate manager shall be appointed in the manner provided in the scheme aforesaid.

(6) That an inquiry shall be made in such manner as the learned District Judge directs as to the proportion of the net income of the estate that has been distributed by the defendant among the maintenance-holders during the period commencing from three years before the institution of the suit till the assumption of charge by the receiver appointed by the Court. If on such enquiry the District Judge finds that the defendant has not distributed among the maintenance-holders one-half of the net income of the property or such lesser sum as the learned District Judge considers reasonable, an account of income and expenditure of the trust properties for the period aforesaid shall be taken from the defendant and a

decree for a sum not exceeding the difference of the amount so distributed and half of the net income of the property shall be passed against the defendant. The court fee required for the preparation of this decree shall be paid by the trust estate. The decretal amount realized shall be paid into the Court and distributed among the maintenance-holders in such proportion as the District Judge directs.

(7) The scheme shall provide for, among others, the following :

(a) Provision for a sajjadanashin and a manager, the posts being held either by one or by two different persons, and the manner of their election, appointment and removal.

(b) Provision for allowances to be paid to the sajjadanashin and the manager if the offices are held by one person and also when they are held by different persons.

(c) Proportion of income to be spent on the religious, educational and charitable objects and the proportion to be distributed among maintenance-holders with due regard to the past usage.

(d) Distribution of duties between the sajjadanashin and manager when the offices are held by different persons so that the sajjadanashin may remain in charge of the religious duties and maintain them out of the funds provided by the manager.

(e) Provision for the appointment of a committee of supervision for the preparation of the budget and supervising the works of the sajjadanashin and the manager.

(f) Provision that the sajjadanashin and manager shall as far as practicable be from among the descendants of Shah Gholam Moula.

(g) Provision for periodical audit of accounts and their inspection.

(8) The scheme prepared shall be liable to be modified or altered as occasion arises on a proper application made to the District Judge.

The District Judge will now proceed to prepare a scheme for the management of the trust properties. At the time of the preparation fullest opportunity will be given to the descendants of Shah Gholam Moula to appear and represent their case before him. He will also consult and take the views of such persons interested in the institution as he thinks fit. Till the scheme is prepared and given effect to, the receiver appointed by the Court will remain in office. He will pay to the sajjadanashin such sum for the performance of the religious ceremonies and his allowance as the District Judge directs.

The decree of the lower Court is varied but the appeal has in the main failed and with the modifications above indicated is

dismissed with costs. The defendant-appellant shall personally pay the costs of the plaintiffs both of the Court below and this Court. The hearing fee in this Court shall be calculated at the rate of Rs. 75 for each day of the hearing. A fresh decree will be drawn up in this Court.

Scroope, J.—I have had the advantage of reading the judgment of my learned brother and I agree with his findings and the decree he proposes to pass in this case.

In the written statement the defendant took the plea that the reference to religious and charitable purposes in the original grant was really not a condition attaching thereto and was not the operative part of the grant but was rather by way of recommendation and as expressing a pious wish of the grantor. We have in this case a number of documents in which the property is referred to, covering a period of almost two centuries from the original Moghul grant in 1748 down to the present time—I refer in particular to the original sanad, the warasatnama, the confirmatory sanads of the East India Company, the rubakararis of the Collectors of Monghyr and Bhagalpur, the different land registration proceedings, the plaints and written statements in suits relating to this property, and the finally published Record of Rights. In every one of them there is a reference either direct, incidental or inferential to the trusts attached to this property. Here and there from the different documents isolated words and sentences have been extracted by the appellants as indicating complete proprietary right in the property free from all trusts; but the documents must be read as a whole, and in my opinion applying the test of contemporaneous exposition no other conclusion whatsoever is possible than that the suit property is burdened with a public trust of a charitable or religious nature. Questions relating in one way or the other to this property had been frequently before the Courts both revenue and judicial; before the former in the early days of the last century when apparently one Shyam Singh called into question the nature of the grant, again with reference to the desirability of its being taken charge of under Regn. 19 of 1810: and later still in proceedings under the Land Registration Act; before the latter in the form of suits for the disputed sajjada-

nashinship, suits for accounts, suits for rents and so on ; in truth until in the present case the defendant has done so, nobody ever set up a claim of complete proprietorship unburdened by any obligation of a public or private nature. As to defendant himself, in 1913 he applied for registration of his name in his capacity as sajjadanashin and he was registered as muttawali in respect of the property connected with the khankah. In 1914 he defended a suit in respect of this property and stated that it was a wakf property and that nobody had any proprietary rights in it: vide Ex. 20. In 1916 he filed a suit for accounts on the footing that certain villages including the property now in suit were wakf property of the Moulanagar khankah of which he was in possession as sajjadanashin; in the previous wakf suit in 1922 he pleaded that the properties were burdened with the discharge of certain charitable and religious functions, having been granted originally as "madad mash" to Shah Gholam Maula. There are abundant other instances on the record where litigation proceeded on the footing that these were trust properties. Again ever since its creation, this estate has spent quite a considerable portion of its income in the charitable purposes enumerated in the original grants. I refer to defendant's own document Z (3), a rubakari of resumption proceedings in 1836 in the Court of the Deputy Collector of Monghyr, for settlement of the pargana under Reg. 2 of 1819 and 3 of 1828. The Deputy Collector found that the then holders of the estate had in the seven years from 1233 to 1239 Fasli spent more than half the income on the purposes of the khankah. Again in Ex. 42 a written statement by sajjadanashin Aley Ahmad runs as follows:

"The defendant admits the plaintiff's allegation in his plaint that the annual expenditure in connexion with the khankah is Rs. 2,000."

Again the defendant himself in his evidence pleads annual expenditure of Rs. 8,000 to Rs. 9,000 on the upkeep of the khankah and the objects connected with it. Indeed he has never challenged the actual practice in this respect and he could not do so on the facts. Sir William Hunter in his Statistical Account of Bengal describing the revenue-free tenures of the Monghyr District, writes in 1876 as follows:

"The largest revenue-free tenure in the district is the entire Abhaipur Parganna held by the khankah or monastery at Maulanagar, which was confirmed by sanad of council, dated 9th February 1786. The proceeds of the estate are expended in feeding travellers and beggars, in keeping a school and a mosque, and also in the personal expenses of the endowed family."

In face of this long course of contemporary exposition and usage and apart from there being a very clear case of estoppel against him it is in my opinion entirely idle for the defendant now for the first time to set up a claim to full proprietorship. As Lord Turner said in the *Attorney-General v. Corporation of Rochester* (47):

"Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument the Court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a period applied."

Applying the test laid down by this learned Judge the plaintiffs are in my opinion on practically unassailable ground, in fact sufficient to conclude this part of the case : and as my learned brother has shown the original sanad indicates very strongly that the grant to Shah Gholam Maula was not a personal grant for the maintenance of the khankah founded by Shah Nizamuddin.

The really substantial contention in the appeal was that the property is not legally wakf and that if it is wakf the position of the defendant is not that of the trustee in respect of it and that therefore S. 92, Civil P.C., has no application. There is very great similarity between this case and the two grants referred to in *Kulb Ali Hussein v. Syf Ali* (1) and *Mt. Quadira v. Shah Kabeer Ooddeen* (3); two grants were in question in the latter case and it is to the second grant, commonly known as the Alamshahi grant that the grant in suit bears a very strong resemblance. Those two cases entirely dispose of the contention advanced for the appellant that the grants lack the essentials of wakf as no charitable intention is expressed in the document and as the characteristic of perpetuity is wanting. Wakfs in connexion with khankahs are a very well-known feature of Islamic institutions and have been

(47) [1854] 5 De. G. M. & G. 797.

recognized in numerous decisions of which the two mentioned above bear the closest resemblance to the present case.

I would also refer to the decision of the Privy Council in *Jewan Doss Sahoo v. Shah Kubir-ooddeen* (4) which follows these two decisions. I can see no substance at all in the contention that the objects in the sanad, namely meeting the expenses of the drum-beaters, travellers, the madad mash of sajjadanashin and the upkeep of the khankah, are not valid objects of wakf. They seem to me when taken together, to fulfil the requirements completely as indicated in the leading text-books on Mahomedan law.

Indeed Sir Abdur Rahim has taken all what I may call the stock objections that can be taken against a claim of wakf: for instance, another contention was that the original sanad constituted a family settlement in favour of Shah Gholam Maula and that the distribution on religious objects was left entirely to the holder's discretion and that these incidents negative a valid wakf. Apart from the Wakf Validating Acts, 1913 and 1923, with which admittedly we are not concerned here, whatever uncertainty there might have been at one time regarding the legality of family settlements in the form of wakf, the law is more or less crystallized by reason of the decisions of their Lordships of the Privy Council, for instance, in *Mahomed Ahsanulla Chowdhury v. Amarchand* (48) and *Ramadan Chettiar v. Vava Levvai Marakayar* (7). As a result of these and other decisions an endowment is not vitiated as wakf by the fact of its containing provisions in favour of the founders of the family or in favour of a particular family and their descendants provided that the primary object appears to be a permanent application of the property to some public and unfailing purpose. As my learned brother has shown such permanent application is the result of the deed in question (Ex. 50) and, as I said above it has not been disputed that ever since its foundation a considerable portion of the income has always been devoted to charitable purposes. Nor do I think can it be seriously contended that it is an illusory wakf; obviously the grantor could have had no object in creating a fictitious wakf in favour of the descendants of Shah Gholam Maula. His pur-

pose undoubtedly was a charitable one, namely to provide for the upkeep of the khankah.

Sir Abdur Rahim relies very strongly on the case of *Kuneez Fatima v. Saheba Jan* (5) as meeting the cases which I have followed. It is true that the sanad in that case is not at all unlike the sanad in the present case; but there the decision was very much influenced by the fact that the former proprietors had dealt with the estate in a manner wholly inconsistent with its being an endowment and the alleged endowment there had never come under the superintendence of the Board or the local agents established by Regn. 19 of 1810. As my learned brother has pointed out though the right to receive the maintenance from the residue after the necessary provision has been made for charity has been the subject-matter of transfer, there is no instance of any transfer of the corpus of this property and, as I said, there has been for well nigh two centuries consistent disposal of quite a considerable part of the funds on charitable purposes.

As regards the application of Regn. 19 of 1810, as has been shown in the judgment of my learned brother and of the first Court, the action of the revenue authorities at the time was seemingly inconsistent and the position is undoubtedly obscure. It must however be borne in mind that the object of this Regulation was to provide that all endowments for the support of mosques, temples, etc., should be applied according to the real will and intention of the grantor, to use the words of the preamble. Government did not, under this Regulation, actually assume the management of these endowments; they only made themselves responsible for their due application; local agents were to be appointed for the discharge of these duties by the Board of Revenue and the Commissioners and they were to ascertain the necessary particulars regarding all endowments and report them to the Board of Revenue; my reading of the various rubakaris on this point is that as Government was satisfied as a result of their inquiries undertaken under this Reg. that the public trusts connected with the property were being duly provided for, they considered it unnecessary to interfere any further with the management of the property, more especially as

(48) [1889] 17 Cal. 498=17 I. A. 28 (P.C.).

it was a rent-free grant to Shah Gholam Maula. Whatever doubt there may have been in the minds of the officers dealing with the question as to the applicability of the Regulation, they had no doubt at all, so far as I can see, that the property was burdened with a public trust of a charitable nature. Some cases of Government interference with the trust must however be emphasized. In 1856 the Collector of Monghyr under instructions from the Board of Revenue made a personal investigation into charges against Shah Muhammad Yasin for "mismanagement of the Abhaipur trust." After investigation by calling for a statement of five years receipts and expenditure, nothing was found to justify the allegation of mismanagement. In February 1858 the Commissioner asks the Collector to report the name of an individual duly qualified to be sajjadanashin in place of the late Shah Muhammad Yasin and in May 1858 he informs the Collector he has rejected objections against the nomination of Aley Ahmad. A letter of the Board of Revenue in September 1858 confirms these proceedings of the Collector and Commissioner: vide Exs. 36, 37, 38 and 39, where the property is referred to indifferently as the "Abhaipur Trust," "Abhaipur Endowment," "Abhaipur Institution."

This interference is irreconcilable on any other explanation than that it was a public trust of a charitable or religious nature. In my view of the matter, so far as the applicability of this Regulation goes, the history of the matter is decidedly against rather than for the defendant. Besides, another consideration which must be borne in mind is that we are here considering whether the property is a trust for a religious or charitable purpose as contemplated under S. 92, Civil P. C.; and the learned District Judge rightly took the view that even if the wakf theory should fail for any reason, we are not only entitled to presume, but ought to presume, the existence of a charitable and religious trust, as is said in *Mahant Puran Atal v. Darshan Das* (28). Sir Abdur Rahim argues that a public trust other than wakf is unknown to Mahomedan law. The sole authority for this proposition seems to be the dictum of Karamat Husain, J., in *Puran Atal v. Darshan Das* (27), but, as my learned brother has shown, the view

taken in that particular case by that learned Judge was not accepted in the Court of appeal in *Puran Atal v. Darshan Das* (27). There were some old decisions to the effect that heritable property might under Mahomedan law be burdened with a trust of a religious nature, such as, maintaining the tomb of a saint without becoming wakf and that it might then be alienated subject to that trust: see *Bibee Kuneez Fatima v. Bibee Sahiba Jan* (5) and *Futtoo Bibee v. Bharrat Lal Bhukut* (30). But these cases were overruled by the decision of the Privy Council in the case of *Bishen Chand Basawut v. Syed Nadir Hossein* (49) in which a property burdened with a trust of this nature was held not to be attachable by personal creditors of the trustee as of course it would have been if he could have alienated it subject to the trust. This latter case does not go the length of saying that there cannot be a public trust without its being wakf but what it does say is that a property burdened with such a trust is inalienable which of course is the main characteristic of a wakf. Similarly here the question is whether the property is trust property within the purview of S. 92, Civil P. C., and very clearly it is and has that characteristic of wakf. As to whether it has all the other characteristics of wakf the question is really academic once the above finding is arrived at. What I wish to lay stress on is that, assuming the correctness of Sir Abdur Rahim's proposition, he has not been able to show that there is any incident in this property foreign to a wakf. The learned advocate in this connexion also relied on the decision of their Lordships in the Privy Council in *Vidya Varuthi Thirtha v. Balusami Ayyar* (11) for his contention that S. 92 had no application to the head and manager of a religious institution like a wakf. The short answer to this argument is that to accept it would mean holding that the provisions of S. 92 have been consistently misapplied by the Courts in India. Decisions after decisions can be cited where S. 92 has been applied to cases of wakfs and Hindu endowments.

It was substantially on these lines that the finding of the learned District Judge as to the trust character of the

(49) [1887] 15 Cal. 329=15 I. A. 1=5 Sar. 113 (P. C.).

property was challenged at very great length but the argument left me entirely unconvinced. Whatever difficulties there might be in the interpretation of the original sanad, after that the way is clear, and for its time a plainer case of a public trust for religious purposes so far as the practice of nearly two centuries goes it would be difficult to find in this country. Indeed I think that the defendant, in view of his own previous admissions was very ill advised to deny his public obligations in respect of this estate.

As to his removal from the manager-ship, that is inevitable on the findings of the learned District Judge, which passed unchallenged in Sir Abdur Rahim's argument. In his final reply to the respondents Mr. Hassan Jan for the appellant challenged them all, and thus took the respondents and ourselves rather un-awares by this unusual procedure. It is perfectly clear that the trust property is being grossly mismanaged: proper accounts are not kept, Government demands are not paid in time, with the result that penalties are incurred; and the defendant has been treating the trust money as his own. Another very serious act of misbehaviour is a nominal lease of 24 bighas of kasht land to his brother-in-law, which the learned District Judge has really found to be a conversion to his own use. It is clear that he cannot be allowed to continue in the management. As regards personal misbehaviour rendering him unfit to hold the sajjadanashinship I agree with my learned brother that the charges are not so well established as to justify his removal from his spiritual duties.

K.N./R.K. *Order accordingly.*

A. I. R. 1932 Patna 60

MACPHERSON AND FAZL ALI, JJ.

Ram Bilas Singh and another—Plaintiffs—Appellants.

v.

Birich Singh and others—Defendants—Respondents.

Second Appeal No. 772 of 1928, Decided on 2nd June 1931, against decision of Addl. Sub-Judge, Patna, D/- 25th February 1928.

(a) Civil P. C. (1908), Sch. 2, Paras. 20 and 21—Arbitrators can adopt formalities of their choice if nothing is said at time of reference.

Where a reference to arbitration is made without the intervention of the Court and where

writing is not required by the terms of the submission, a parole or oral award is good and will bind the parties. Similarly a written award which is not signed by the arbitrators is equally valid unless the parties had made it a condition of reference that the award should be in writing and be signed by the panches. Where however nothing is said at the time of the reference as to the form of the award, the arbitrators may adopt such formalities as they choose: 26 Bom. 132, Ref. [P 61 C 2]

(b) Civil P. C. (1908), Sch. 2, Para. 10—Para. 10 applies to arbitration through intervention of Court only.

Paragraph 10 applies to those awards only which are made when the suit is referred to arbitration through the intervention of the Court. [P 61 C 1]

A. H. Fakhruddin—for Appellants.

S. N. Rai—for Respondents.

Fazl Ali, J.—The only question to be decided in this appeal is whether a certain award is valid and it arises on the following facts:

One Baijnath Singh who had married three wives had a son Debi Singh by his first wife and two other sons Deo Kumar and Ram Bilas by his second wife. Ram Bilas and his son are the plaintiffs in the present litigation and the descendants of Debi Singh are the defendants. It is common ground that at one time all the three sons of Baijnath were living jointly with their father. The plaintiffs' case however is that Debi Singh separated from his father during his lifetime, while the rest of the family continued to be joint and that the plaintiffs being joint with Deo Kumar at the time of his death, are entitled to all his properties by survivorship. The case of the defendants was that after the death of Debi Singh the defendants, the plaintiffs and Deo Kumar separated from one another, but Deo Kumar reunited with the defendants before his death. They also alleged that soon after Deo Kumar's death there was an arbitration and Deo Kumar's properties were divided between the plaintiffs and defendants as the result of an award made by the arbitrators which was at the moment accepted by both the parties.

The learned Munsif who tried the suit found that Deo Kumar died in a state of jointness with the plaintiffs, but he was living with the defendants at the time of his death. He also held that there was an arbitration and the award given by the arbitrators was valid and binding on the parties. The lower appellate Court which addressed itself mainly to the question of the validity of the award

has agreed with the Munsif in finding that the award was binding on the parties and therefore dismissed the appeal.

The only question which was argued in this Court was that the award was not valid (1) because one of the plaintiffs being a minor, there was no proper reference to arbitration, and (2) because the award was not signed by any of the arbitrators.

It appears to me that there is very little substance in the first point because there is no doubt that plaintiff 1, who is the father of plaintiff 2 and who was the karta of the family at the time, was a party to the reference. As regards the other point, the learned advocate for the appellant wishes us to hold that even though this was a reference without the intervention of the Court, it must be governed by para. 10, Sch. 2, Civil P. C., which requires that where an award has been made the persons who made it shall sign it. This contention however does not appear to me to be sound. There can be no doubt that para. 10 applies to those awards only which are made when the suit is referred to arbitration through the intervention of the Court and this is clear not only from the place which para. 10 occupies in Sch. 2, but also from its language which is as follows :

"Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, etc."

This provision clearly lays down that the award to which it refers must have been made in a suit and it further enjoins that the persons who make the award shall cause it to be filed in Court. The paragraphs which relate to awards made when there is reference to arbitration without the intervention of the Court are paras. 20 and 21. Para. 20 is not very material because it simply empowers any person interested in the award to apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court. Para. 21 runs thus :

"Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in para. 14 or para. 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award."

This paragraph neither lays down that the award should be in writing nor does it say that if in writing it should be signed by the arbitrators. All that is

required is (1) that the Court should be satisfied that the matter has been referred to arbitration on which an award has been made, and (2) that the award is not liable to be attacked on grounds set out in para. 14 or 15, Sch. 2, Civil P. C. Now, there is ample authority for the proposition that where a reference to arbitration is made without the intervention of the Court and where writing is not required by the terms of the submission, a parole or oral award is good and will bind the parties. In *Savla v. Devchand* (1) Jenkins, C. J., observed that the oral award, though undesirable, was perfectly valid. If therefore an oral award is valid, I do not see why a written award which is not signed by the arbitrators should be held to be invalid even though a Court is satisfied that the award is a genuine one and was actually made by the arbitrators to whom the matter was referred for arbitration. It may be conceded that in a private reference without the intervention of the Court if there is evidence that certain material formalities were required by the submission or that the parties had made it a condition of reference that the award should be in writing and be signed by the panches, then the award must be made and executed with all the material formalities required by the submission. Where however nothing is said at the time of the reference as to the form of the award, it is clear that the arbitrators may adopt such formalities as they choose. Thus the only point urged in this appeal fails and as both the Courts are satisfied that there was an award made in this case and that it was acted upon for sometime, the appeal is concluded by findings of fact and must be dismissed with costs.

Macpherson, J.—I agree.

K.N./R.K. *Appeal dismissed.*

(1) [1901] 26 Bom. 132=3 Bom. L. R. 691.

A. I. R. 1932 Patna 61

JWALA PRASAD, J.

Mt. Mana Kuer and another—Plaintiffs—Appellants.

v.

Ram Naresh Rai and others—Defendants—Respondents.

Second Appeals Nos. 365 to 376 of 1928, Decided on 18th December 1930, against decision of Dist. Judge Shahabad, D/- 19th September 1927.

(a) Bengal Tenancy Act (1885), Ss. 30 (b) and 35—In suits for enhancement of rent quality of land is immaterial—Discretion of Court.

In a suit for enhancement of rent under S. 30 (b) the mere fact that the lands in suit are of bad quality is immaterial. S. 35 does not give the Courts unrestricted discretion to deprive the landlords of what is justly and properly due to them, and though a Court may be generous to the tenant, it must at the same time be just to the landlord. It is erroneous to think that the principle underlying S. 30 (b) entitling the landlord to an enhancement of rent is that the raiyat is better off, and consequently a Court acts improperly under S. 35 in disallowing or reducing the proper enhanced rent on the ground that the price of the goods which the raiyat has to buy with the money which he obtains from the sale of his surplus crops, for example, cloth, oil, spices, agricultural implements, has risen to the same extent or to a greater extent than the price of rice and wheat and the raiyat will ordinarily be worse off: *A. I. R. 1929 Pat. 348 and 702; A. I. R. 1930 Pat. 76 and 162 and A. I. R. 1927 Pat. 144, Ref.* [P 63 C 1,2]

(b) Bengal Tenancy Act (1885), S. 52 (a)—Court should find whether there has been assessment or not, of rent, subsequent to inception of tenancy on basis of area.

In a suit for excess rent for excess area in respect of a tenancy the finding that there is nothing to show that at the inception of the tenancy rent was settled or that it was understood that rent should be settled by assessment on area is not sufficient for the disposal of the controversy between the parties. The landlord's case does not depend on his being able to prove what had happened at the inception of the tenancy. If the landlord can show that since the creation of the tenancy rent had been assessed, and that when rent was last assessed the assessment was on the basis of a certain area and that the defendants are in possession of land on which no rent was assessed at the time then the landlord is entitled to increase of rent. The Court should come to a finding whether or not there has ever been assessment of rent on the basis of area and, if so, whether that area is less than the land found to be held by the tenant at the time of the suit: *58 I. C. 959; A. I. R. 1926 Pat. 197; 2 P. L. J. 276 and A. I. R. 1923 Cal. 278, Ref.* [P 64 C 2]

N. N. Sinha and B. P. Sinha—for Appellants.

Rai Gurusaran Prasad, K. N. Varma, D. N. Das and D. N. Sircar—for Respondents.

Judgment.—These are twelve second appeals. The corresponding numbers of the original rent suits and the first rent appeals in the Court below are given in the heading of this judgment.

The plaintiffs are landlords of 16 annas in Mouza Pharaura, Pergana Peru Tauzi No. 4707, having purchased the milkiat interest under a registered deed of sale, dated 18th December 1922 (cor-

responding to 4th Pous, 1330). In all these cases the plaintiffs claimed an enhancement of rent under S. 30 (b), Ben. Ten. Act, and except in two of them, namely, Second Appeals Nos. 373 and 376 (corresponding to Rent Suits Nos. 165 and 162 of 1926 and first Rent Appeals Nos. 101 and 100 of 1927) they also claimed an enhancement under S. 52 (a) of the Act,

The defendants-respondents are tenants under the plaintiffs having qaimi status in the land held by them. They resisted the plaintiffs' claim and disputed their right to enhance the rental under any of the aforesaid sections.

The Munsif allowed enhancement at the rate of four annas per rupee under S. 30 (b) and at the rate of Rs. 3 per bigha for the excess land under S. 52 (a), Ben. Ten. Act. On appeal by the defendants the learned District Judge of Shahabad reduced the enhancement under S. 30 (b) to one anna in the rupee and altogether disallowed enhancement under S. 52 (a) for the excess land. Against the decision of the District Judge the plaintiff landlords have come up to this Court in second appeal.

The defendants-respondents only in four of the second appeals have entered appearance and contested the appeal. In the other appeals they have not entered appearance.

The appellants contend that the District Judge is wrong in law in setting aside the decision of the Munsif. They rely upon the recent decisions of this Court in which the views as taken by the learned District Judge of Ss. 30 (b) and 52 (a) have been set aside.

Now both the Courts below have held that prices of staple crops had risen and according to the Munsif the average came to four annas per rupee and according to the District Judge it came to four annas four pies in the rupee for up land and two annas ten pies in the rupee for low land. The learned District Judge however did not allow the admissible enhancement of four annas four pies, or four annas as allowed by the Munsif, but reduced it to one anna in the rupee upon the grounds stated by him to be (1) that the lands of the village are of very poor quality and that some other lands near about have in recent years been sold from Rs. 20 to Rs. 40 a bigha and under S. 35 the capacity of the land must

be one of the numerous factors which must enter into a consideration of what fair rent should be allowed; (2) the period of years on which calculation under S. 32, Ben. Ten. Act, is based includes the years of the war and the post-war economic disturbance when prices were very unsettled and (3) that the fact that the prices of all the commodities which a tenant has to purchase have increased not less than the prices of food crops must also be taken into consideration. By this Court each and all of these grounds were held to be untenable for disallowing or reducing an enhancement under S. 30 (b) in several cases dealt with by different Judges of this Court not less than six in number. My own view has been the same as that of the other learned Judges but I do not find my decision to have been reported. I would just quote the decisions in those cases as repudiating each and all of the grounds given by the learned District Judge for reducing the enhancement under S. 30 (b) to one anna in the rupee.

(1) Das and Fazl Ali, JJ., in the case of *Nirmal Kumar v. Gauri Prasad Singh* (1) held that

"In a suit for enhancement of rent under S. 30 (b), Ben. Ten. Act, the mere fact that the lands in suit were of bad quality is immaterial."

and that

"Section 35, Ben. Ten. Act does not give the Courts unrestricted discretion to deprive the landlords of what is justly and properly due to them; and though a Court may be generous to the tenant it must at the same time be just to the landlord."

(2) Das and James, JJ., in the case of *Kamala Prasad Singh v. Bankey Prasad Singh* (2) held that

"It is unsound to hold that S. 30 (b) applies only where the rise in prices of staple food crops benefits the raiyat and enables him to pay a higher rent, and that it does not apply where the price of cloth, oil etc., has risen. S. 30 (b), Ben. Ten. Act, is not based on economic principles but on the legal and historical principle that the landlord is entitled to a certain share of the produce of the holding. Under S. 35 of the Act it is necessary to show that the rent payable by the raiyat is already unduly high or that the productive capacity of the land has deteriorated through no fault of the raiyat since his rent was settled on the previous occasion, otherwise the tenant is liable to pay the enhancement which would be admissible under the rules laid down by S. 32."

(3) Wort, J., in the case of *Rameshwardhari Singh v. Mahabir Singh* (3) held that

"It is erroneous to think that the principle underlying S. 30 (b), Ben. Ten. Act entitling the landlord to an enhancement of rent is that the raiyat is better off, and consequently a Court acts improperly under S. 35, Ben. Ten. Act in disallowing or reducing the proper enhanced rent on the ground that the price of the goods which the raiyat has to buy with the money which he obtains from the sale of his surplus crops, for example, cloth, oil, spices, agricultural implements, has risen to the same extent or to a greater extent than the price of rice and wheat and the raiyat will ordinarily be worse off."

(4) Das, J., in the case of *Muhammad Abdul Hasnat v. Rambilas Singh* (4) held that

"It is erroneous to hold that S. 30 (b), Ben. Ten. Act is based on the assumption of the Manchester School of Economics that a rise in the price of agricultural produce necessarily benefits the tenant and a Court acts illegally in dismissing the claim for enhancement under S. 30 (b) of the Act on the ground that the Indian raiyat has not benefited by the rise in prices of food crops."

(5) Ross and Kulwant Sahay, JJ., in the case of *Mt. Sayedatulnissa v. Amrit Mahto* (5) held that

"When the rise in the price of staple food crops has been established, there ought, in the absence of special circumstances, to be a corresponding increase in the rent. S. 35, Ben. Ten. Act, does not justify the broad proposition that the only way of determining the fairness of a rent is to compare the present incidence of the rent with the average outturn of the land."

As observed above, I am in full accord with the aforesaid decisions and sitting singly I am bound to follow them. I therefore set aside the decision of the learned District Judge under S. 30 (b), Ben. Ten. Act, and hold that the plaintiff landlord appellants are ordinarily entitled in these cases to the maximum enhancement of four annas four pies in the rupee for up land and two annas ten pies in the rupee for low land. Considering however the circumstances of the case the learned advocate on behalf of the appellants and the learned advocate on behalf of the respondents who have entered appearance agree that the enhancement be at the rate of two annas six pies in the rupee. I would allow this enhancement in all the cases.

As regards the claim under S. 52 (a), Ben. Ten. Act, the Munsif held that from the khatian it appears that more land is

(1) A. I. R. 1929 Pat. 348=121 I. C. 476.

(2) A. I. R. 1929 Pat. 702=124 I. C. 390.

(3) A. I. R. 1930 Pat. 76=124 I. C. 394.

(4) A. I. R. 1930 Pat. 162=122 I. C. 815.

(5) A. I. R. 1927 Pat. 144=100 I. C. 754.

in possession of the defendants than that shown in the jamabandi, and the defendants admit that they are in possession of the land as shown in the khatian. He also held that the plaintiffs proved the standard of measurement to be 5-1/2 cubits and the defendants failed to prove that the standard of measurement is 11 cubits as alleged by them. Relying on teiskhana jamabandi (Ex. 1) the Munsif held that they are rates of rent and that the realisation is made at the rate shown in Ex. 1. He also relied upon D.W. 1 and P.W. 3 that the rate of rent for this land is Rs. 3 per bigha. Thus, the Munsif held that the defendants are in possession of more land than that for which they pay rent, and the rate of rent varies from Rs. 2-8-0 to Rs. 7 per bigha; but relying upon the defendants' own admission he allowed rent for the excess area as shown in the plaint at the rate of Rs. 3 per bigha.

The learned District Judge accepted the plaintiffs' evidence that a luggi always used in the village is 5-1/2 cubits, but he says that it does not prove that the areas entered in the jamabandi are correct and the plaintiffs should have shown that 5-1/2 haths go to make up a luggi and a hath accurately consists of 18 inches. The evidence shows that a hath is measured from the elbow to the tip of the finger of some individual in the village. Upon this finding the learned District Judge holds that the fact that the area found in the cadastral survey is less than that shown in the jamabandi does not necessarily show that the raiyats have taken possession of the additional lands unless the entries in the jamabandi were shown to be accurate at the time they were made. Accordingly he disallowed the enhancement altogether under S. 52 (a).

Now in the case of *Lalla Sheo Kumar Lal v. Ramphal Dass* (6) it was held that the landlord need not prove the particular land as being the land held by the tenant in excess of the area originally held by him provided he shows that the rent is paid according to the area whether that area is arrived at in the beginning by measurement or not. The subsequent detection of any change in the area would entail a corresponding alteration in the rental whether it be a reduc-

tion in favour of the tenant or enhancement in favour of the landlord. In the case of *Sib Sahai Lal v. Bijai Chand Mahtab* (7) Mullick, Ag.C.J., and Kulwant Sahay, J., held that where tenancy is created not with reference to any boundaries or a specific block otherwise identifiable, but for a certain area at a certain rental, the area is of the essence of the contract and any subsequent excess found upon measurement renders the raiyat liable to pay additional rent under S. 52 (a), Ben. Ten. Act. Similarly, in the case of *Maharaja Kesho Prasad Singh v. Tribhuan* (8), Mullick and Jwala Prasad, JJ., held that in a proceeding for enhancement of rent under S. 52, Ben. Ten. Act, 1885, if the landlord shows that, by a contract between himself and the tenants, it was agreed that a certain rental at a certain rate per bigha was to be paid for a certain area, then he is entitled to an enhancement of the rent even if that area was agreed upon without any actual measurement or even though there is no practice of measurement within the pergana within which the land is situated. It is not incumbent upon the landlord to prove that there was an actual measurement or that there is a practice of measurement.

In the case of *Raja Jogendra Kishore Roy Choudhury v. Sheikh Aktar* (9), it was held that in a suit for excess rent for excess area in respect of a tenancy the finding that there is nothing to show that at the inception of the tenancy rent was settled or that it was understood that rent should be settled by assessment on area, is not sufficient for the disposal of the controversy between the parties. The landlord's case does not depend on his being able to prove what had happened at the inception of the tenancy. If the landlord can show that since the creation of the tenancy rent had been assessed, and that when rent was last assessed the assessment was on the basis of a certain area and that the defendants are in possession of land on which no rent was assessed at the time, then the landlord is entitled to increase of rent. The Court should come to a finding whether or not there has ever been assessment of rent on the basis of area and, if

(6) [1920] 53 I. C. 959.

(7) A. I. R. 1926 Pat. 197 = 90 I. C. 362 = 5 Pat. 157.

(8) [1917] 2 Pat. L. J. 276 = 39 I. C. 611.

(9) A.I.R. 1923 Cal. 278 = 57 I. C. 993.

so, whether that area is less than the land found to be held by the tenant at the time of the suit.

In the present case the learned District Judge has not disposed of the finding of the Munsif that the old jamabandi shows that the tenants are in possession of more area than that found by the cadastral survey and entered in the khatian and that the standard of measurement was 5-1/2 cubits and further that the teiskhana jamabandi shows that there are rates of rent and the realization is made at the rate shown in the jamabandi. Still more D. W. 1 admitted that the rate of rent is Rs. 3 per bigha. All these justified the finding of the Munsif that the settlements were made according to area and the total rental payable by a tenant was arrived at by calculation of the rates of different lands settled with him. Besides that, the landlords and the tenants in this Court were called upon to produce counterfoil and receipt books. These counterfoil receipt books have been produced and show that the areas and the rentals are mentioned therein. All this evidence combined together supports the landlords' case that the defendants are in possession of more land than that for which they pay rent. The teiskhana jamabandi (Ex. 1) shows that the rate of rent varies from Rs. 2-8-0 to Rs. 7 per bigha and that the lands at various rates were settled with the tenants. The Munsif gave enhancement at the rate of Rs. 3 per bigha. I would reduce it to Rs. 2-8-0 per bigha, the lowest rate shown in the jamabandi.

The result is that the appeal is decreed as aforesaid. The plaintiffs are allowed enhancement under S. 30 (b) at the rate of two annas six pies in the rupee in all these cases and additional rent at the rate of Rs. 2-8-0 per bigha for the excess area found in their possession over the jamabandi area, except in two cases.

The plaintiffs would get their costs of these appeals from the contesting respondents in Second Appeals Nos. 365, 371, 373 and 375 of 1928. In the other cases in which the respondents have not appeared the plaintiffs would not get any costs.

K.N./R.K.

Order accordingly.

* A. I. R. 1932 Patna 65

WORT, J.

Bindeshwar Prasad—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 161 of 1931, Decided on 2nd May 1931, from order of Sub-Divl. Magistrate, Barh, D/- 15th December 1930.

* Prevention of Cruelty to Animals Act (11 of 1890), S. 6—Original complaint filed against employee—Magistrate issuing summons against owner not named in complaint—Owner tried and convicted—Magistrate does not act without jurisdiction—Criminal P. C. (1898), S. 190 (c).

Where the original complaint under S. 6 is filed against the employee, i. e., the cart-driver and not against the owner and the Magistrate issues a summons against the owner who was not named in the complaint and tries and convicts him, he does not act without jurisdiction: 4 C. W. N. 367, *Ref.* [P 65 C 2]

The expression "permits" in S. 6 does not involve any conscious act on the part of the person who is held to be liable under the section. Where a sick bullock is the property of the owner and is employed in the work of the owner by the driver, it is none the less employed by the owner by reason of the fact that the owner employs a bullock-driver to drive this bullock or other bullocks. S. 6 aims not only at the liability of a person actually in charge of the animal but also aims at the person who owns it: in other words, he cannot shelve his responsibility by pleading ignorance of the fact. [P 66 C 2]

Baldeva Sahay—for Petitioner.

Judgment.—This rule is directed against the order of the learned Sessions Judge upholding the conviction of the petitioner under S. 6, Prevention of Cruelty to Animals Act, being Act 11 of 1890.

It is stated as one of the points in the case that the original complaint was filed against the employee of the petitioner, that is to say, the bullock-driver and not against the petitioner, and that when the Magistrate issued a summons against the petitioner, who was not named in the complaint, the trial was without jurisdiction. In my judgment that argument cannot be supported. In the case of *Charu Chandra Das v. Narendra Krishna Chakravarti* (1), the same question came up for disposal by a Division Bench of the Calcutta High Court, and in the course of the judgment it is stated that

"it appears to us that this is not a matter in which the Magistrate acted without jurisdiction. The matter was before him on the complaint

(1) [1900] 4 C. W. N. 367.

made against another person and as the evidence disclosed the fact which has been found by the Magistrate that the petitioner was concerned in that offence process was issued against him. It seems to us that the Magistrate was competent to act in this manner and that he was not barred, as stated in the petition made to this Court on which the rule was granted by reason of S. 190 (c), Criminal P. C.,

in other words, the Magistrate acted under S. 190 (c): and the Court goes on to hold that the trial was not without jurisdiction. It is to be noted that the statement to which I have referred was this. In the evidence it was disclosed that another person was concerned in the matter. That is really the substantial point in this case whether another person was concerned in the matter in other words, whether the petitioner, who was the master, was concerned. The argument is based on the fact, which I do not think is disputed, that the master, who was the owner of this bullock, was away at Barh at the time, and it is stated therefore that he had no knowledge of the fact that the bullock-driver was using a sick bullock in a bullock cart. S. 6, Prevention of Cruelty to Animals Act provides:

"If any person employs in any work or labour any animal which by reason of any disease, infirmity, etc., he shall be guilty of an offence under the Act."

The second part of that section says: "or permits any such unfit animal in his possession or under his control to be so employed."

The argument addressed to me by the learned advocate who appears on behalf of the petitioner is that the use of the word "permits" in that section connotes some conscious act on the part of the petitioner and that in the circumstances at any rate the petitioner being absent and being ignorant of the use of this bullock, it cannot be said that he permitted the use of his bullock. The learned Sessions Judge points out that the expression used in the Act is "permits such use" and not "knowingly permits such use." In the first place it is obvious that on fundamental principles of the criminal law, apart from statute, a person cannot be convicted of a crime of another unless the evidence is such as to prove that he abetted or instigated the crime. But it is to be remembered that in this case we have to construe the statute and it is upon the construction of that statute and not upon the general principles of the criminal law that this matter is to be determined. I am in-

clined to agree with the learned Sessions Judge that the expression "permits" does not involve any conscious act on the part of the person who is held to be liable under the section. But it is not for that reason only I would uphold the conviction. The Act says:

"If any person employs in any work or labour any animal."

There is no doubt in this case that the bullock was the property of the petitioner and that it was employed in the work of the petitioner; it is nonetheless employed by the petitioner by reason of the fact that the petitioner employs a bullock-driver to drive this bullock or other bullocks. It seems to me therefore that the section aims not only at the liability of a person actually in charge of the animal but also aims at the person who owns it in other words, he cannot shelve his responsibility by pleading ignorance of the fact. In my judgment this petitioner employed the bullock within the meaning of S. 6, and therefore the conviction was right. The rule is discharged.

K.N./R.K.

Rule discharged.

A. I. R. 1932 Patna 66

MACPHERSON AND DHAVLE, JJ.

Gopi Mahto and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 10 of 1931, Decided on 20th April 1931, from order of Addl. Sess. Judge, Patna, D/- 3rd November 1930.

(a) Criminal P. C. (1898), S. 103.—Stress is on word "respectable."

The gist of S. 103 is that there must be respectable search witness. The stress is on the word "respectable" and not on the word "locality": 8 I. C. 988, *Ref.* [P 68 C 1]

(b) Penal Code (1860), Ss. 352, 52 and 99 — Sub-Inspector of Police proceeding to search house of person accused of having stolen bicycle without complying with the provisions of S. 165 (1), Criminal P. C. — Accused pushing him back and preventing held not to be guilty of offence under S. 352 — Criminal P. C., Ss. 103 and 165 (1) (5).

A, a Sub-Inspector of Police investigating into the case of a theft of a bicycle on receiving information that it was concealed in B's house proceeded to the place and demanded the bicycle and on refusal from B, C and D who were there, asked two of his companions (who were residents of a village four miles distant from the place of the theft) to act as search witnesses and intimated to B, C and D that he would search the house. B, C and D told A not to enter the house and on his insisting to do so pushed him back along with the constable who was with

him. A thereupon sent one of his men to thana for help. B then went inside, took a bicycle and went away. A and his men ran to arrest B but were prevented by C and D from proceeding in that direction.

Held; that the failure or inability on the part of A in the circumstances to secure search witnesses from the locality was no more than irregularity and would not by itself have entitled B, C and D to resist the search if A's action otherwise came within para. 1, S. 99, I. P. C. [P 69 C 1]

That B, C and D could not be convicted under S. 352 in view of A's failure to comply with the requirements of S. 165 (1), Criminal P. C. A could not be said to have acted in good faith within the meaning of S. 52, Penal Code and B, C and D were justified in pushing him back in order to prevent the search which was not strictly in accordance with law. [P 69 C 1]

Per *Macpherson, J.*—Did failure on the part of A to comply with S. 165 afford any ground for a finding that the search was without due care and attention? (*Quaere*). [P 69 C 2]

Yenus—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Dhavle, J. — The three petitioners were convicted by the Subdivisional Magistrate of an offence under S. 353, I. P. C., and sentenced each to a fine of Rs. 100 with six months' rigorous imprisonment in default. The Magistrate also found two of the petitioners, Gopi and Mahabir, guilty of an offence under S. 341, I. P. C., but considered it unnecessary to pass a separate sentence under this section. On appeal the Additional Sessions Judge of Patna altered the conviction of the three petitioners under S. 353 to one under S. 352 but maintained the sentence. He also upheld the conviction of Gopi and Mahabir under S. 341.

James, J., who admitted the revisional application, also directed a notice to issue on Gopi and Mahabir to show cause why sentence should not be pronounced against them under S. 341 as no sentence was imposed under this section by the trial Court. In doing so he observed that any imposition of sentence that may be made by the High Court would amount to an enhancement and that a notice was therefore necessary.

The facts are that the Sub-Inspector of Police Station Maner was making an investigation into a case of theft of a bicycle, and during the investigation received information that the stolen bicycle was concealed in the house of the petitioner Avadh Kurmi of village Musapur or Musapur. He proceeded at once to the house of Avadh and demanded the bicycle, and on receiving a refusal from

the three petitioners who were all there, asked two of his companions, Baldeo Misser (the man who had given the information) and Deosaran, to act as search witnesses and intimated to the petitioners that he would search the house. The petitioners told the Sub-Inspector not to enter the house and when he insisted upon entering it, they pushed him back along with a constable who was with him. The Sub-Inspector had previous to this posted his men round the house, and upon being pushed back he asked Jumai Gope, a chaukidar, to run to the thana for help. The petitioner Avadh then went inside, took a bicycle and went away with it by the door where Jumai had been posted. The Sub-Inspector and the constable ran to arrest Avadh but were prevented by Gopi and Mahabir from going in that direction.

The only point urged in support of the application in revision is that the search which the Sub-Inspector proposed to make was illegal, and that the petitioners were therefore entitled to resist it and committed no offence even under S. 352, I. P. C., in pushing the Sub-Inspector and his constable back. The grounds on which it is contended that the search was illegal are the failure of the Sub-Inspector to call two respectable "inhabitants of the locality," under S. 103, Criminal P. C., to witness the search, and his failure to comply with the requirements of S. 165, Criminal P. C., in the matter of recording in writing the grounds of his belief that anything necessary for the purposes of his investigation would be found in the house and that such thing could not in his opinion be otherwise obtained without undue delay, and specifying in such writing the thing for which the search was to be made, and also in the matter of sending a copy of such record forthwith to the nearest Magistrate empowered to take cognizance of the offence. The Sub-Inspector has explained that in view of the attitude of the men who had assembled on the scene, he did not consider it worthwhile to serve upon them or upon any other persons of the busti a notice under S. 103, asking them to witness the search, but asked Baldeo and Deosaran to act as search witnesses. Baldeo and Deosaran are both men of Balua and had come with the Sub-Inspector to Musapur from that village. A

reference to the survey map of the thana shows that Balua is at least four miles from Musapur and is separated from it by two or three villages. It is plain therefore that Baldeo and Deosaran cannot be said to be "inhabitants of the locality." The lower Courts have held that having regard to the attitude of the local inhabitants, the Sub-Inspector "did the only thing which was possible in those circumstances" and that there was "sufficient compliance with the law as enacted in S. 103, Criminal P. C." The Additional Sessions Judge has further observed that the gist of S. 103 is that there must be respectable search witnesses; and this observation is supported by the opinion of Twomey, J., in *Emperor v. Sit Nyein* (1), that the stress is on the word "respectable" and not on the word "locality." The respectability of the men from Balua has not been challenged. In my opinion the failure or inability of the Sub-Inspector in the circumstances to secure search witnesses from the locality was no more than an irregularity and would not by itself have entitled the petitioners to resist the search if the Sub-Inspector's action had otherwise come within para. 1, S. 99, I. P. C. As to the failure of the Sub-Inspector to comply with the requirements of S. 165 in the matter of making a record and sending a copy of it to the Magistrate, the Additional Sessions Judge has held that the procedure of the Sub-Inspector not being strictly legal, the petitioners were not guilty of an offence under S. 353, being an offence committed against a public servant as such, but that they were guilty under the general law, namely, on the facts proved, guilty of an offence under S. 352, in that they pushed the Sub-Inspector otherwise than on grave and sudden provocation.

The petitioners would certainly be guilty of this offence unless they were entitled in the circumstances to push the Sub-Inspector back in order to prevent him from searching Avadh's house. If the Sub-Inspector had proceeded strictly according to law, the petitioners would have had no right whatsoever to resist him. Now para. (1), S. 99, I. P. C., to which I have already referred, leaves private persons without any right of private defence against any act of a public servant which may not be strictly

justifiable by law, provided it does not reasonably cause the apprehension of death or grievous hurt, and is done, or attempted to be done, by the public servant acting in good faith under colour of his office. The proposed house search could not have reasonably caused any apprehension of death or grievous hurt, and it was a Sub-Inspector of Police under colour of his office that proposed to make the search. The question then is whether the Sub-Inspector can be said to have acted in good faith on the occasion: if so, the petitioners were not entitled to resist him at all, but if otherwise, they were within their rights in keeping him out, and it is not alleged that they used more violence than was necessary to prevent him from conducting a search which was not strictly in accordance with the law. The learned Additional Sessions Judge has at one place in his judgment remarked that the Sub-Inspector was actuated by good faith; but I take the remark to mean no more than that the Sub-Inspector honestly believed the information that had reached him about the bicycle being concealed in Avadh's house. Such an honest belief was however not sufficient to bring the Sub-Inspector within the protection of para. 1, S. 99; for having regard to S. 52, I. P. C., it was necessary for him, if he was to make the search "in good faith," to proceed with due care and attention. The search was to be made under S. 165, a section which authorized him to do so

"after recording in writing the grounds of his belief and specifying in such writing the thing for which the search is to be made,"

and which required a copy of the record to be sent forthwith to the nearest Magistrate. The learned Additional Sessions Judge has found that none of these preliminaries to a legal search was complied with, and he has not found that the failure of the Sub-Inspector in this regard occurred in spite of "due care and attention." The evidence of the Sub-Inspector gives no ground for holding that there was anything to prevent him from complying with the requirements in question; indeed his case was that he had complied with them, but this was not accepted by the Additional Sessions Judge.

In the view that I have taken it is unnecessary to discuss *Lal Mea v.*

(1) [1910] 11 Cr. L. J. 746=8 I. C. 938.

Emperor (2) and *Emperor v. Param Sukh* (3), which were cited on behalf of the petitioners. The Assistant Government Advocate has cited *Gokal v. Emperor* (4), but that was a case where the constables who had arrested a woman on a defective warrant were clearly acting in good faith so that it was not open to the woman's friends to assault them. In view of the Sub-Inspector's unexplained failure to comply with the requirements of S. 165 as found by the learned Sessions Judge, and especially of the failure to comply with the requirements of Cl. (1) of that section, I find it difficult to hold that he was acting in good faith, within the meaning of S. 52, I. P. C., and the petitioners were, it seems to me, justified in pushing him and his constable back in order to prevent a search which was not strictly in accordance with the law. I would therefore, reverse the conviction and with it the sentence passed on the petitioners under S. 352, I. P. C.

As a matter of fact the charge that led to this conviction was in these terms:

"That you on or about 12th day of April 1930, at Musapur, police station Maner, used criminal force to Sub-Inspector J. N. Misser and constable Suraj Singh with intent to prevent them from discharging their duty as public servants and thereby committed an offence punishable under S. 353."

This is really wide enough to cover the action of Gopi and Mahabir in preventing the Sub-Inspector and the constable from catching and arresting Avadh when he was going away with the bicycle. There is force, however, in the contention of the learned counsel for the petitioners that the charge under S. 353, was taken by all concerned to be confined to the act of pushing the Sub-Inspector and the constable and that the obstruction offered to them later on when Avadh was going away with the bicycle formed the subject of the charge under S. 341, I. P. C. The lower Courts have found an offence under this section brought home to Gopi and Mahabir. In showing cause why sentence should not be pronounced against them under this section, learned counsel has found it impossible on the facts found to challenge

the conviction, but he has laid stress on the fact that the trying Magistrate, who knew all the circumstances, considered a separate sentence unnecessary. The offence was however, not by any means venial. The Sub-Inspector of the thana was making an investigation into the theft of a bicycle and was acting under colour of his office in proposing to search the house for that article. It was fortunate for these petitioners and for their relative Avadh that the Sub-Inspector's procedure was marked by irregularities; they could have had no knowledge of this, but in their defence they were entitled to rely on it. When however, it came to Avadh escaping with the bicycle and the Sub-Inspector and the constable going after him to arrest him—arrest him under S. 54, Criminal P. C.—Gopi and Mahabir acted lawlessly and without any technical excuse to be subsequently found for them. Gopi is the father and Mahabir some kind of uncle of Avadh, but their offence really comes under a much graver section, viz., S. 353, though fortunately for them they were only charged under S. 341 for this act, and they are naturally not prepared to face a retrial. Having regard to Gopi's age, however, I would sentence him under S. 341, I. P. C., not to any substantive imprisonment but to a fine of Rupees 200, with one week's simple imprisonment in default; and I would sentence Mahabir under the same section to one month's simple imprisonment and a fine of Rs. 100 with one week's simple imprisonment in default.

Avadh who has been acquitted will be entitled to the refund of any part of the fine that he may have paid.

Macpherson, J.—I agree to the order proposed.

I am inclined to hold that the conviction under S. 353 is good at least against Gopi and Mahabir because of their obstruction to the arrest of Avadh. But as it is true that the Courts below dealt vaguely with this part of the case it is not necessary to press the point, especially in view of the sentence proposed which is adequate punishment for these petitioners. On the question of law I prefer not to express a final opinion as to whether failure on the part of the Sub-Inspector to comply with S. 165 (1), Criminal P. C., would give room for a finding that the search was "without

(2) A. I. R. 1926 Cal. 663=93 I. C. 1038=27 Cr. L. J. 542.

(3) A. I. R. 1926 All. 147=91 I. C. 43=27 Cr. L. J. 11.

(4) A. I. R. 1923 All. 87=71 I. C. 503=24 Cr. L. J. 151=45 All. 142.

due care and attention." But I am satisfied that failure on his part to comply with S. 165 (5) would afford no ground for such a finding.

R.M./R.K.

Order modified.

A. I. R. 1932 Patna 70

COURTNEY-TERRELL, C. J. AND
KULWANT SAHAY, J.

Mt. Kerkati and another—Appellants.
v.

Dibakar Naik and others—Respondents.

Appeal No. 11 of 1929, Decided on 23rd March 1931, against appellate decree of Sub-Judge, Sambalpur, D/- 30th June 1928.

(a) C. P. Tenancy Act (11 of 1893), S. 46—Occupancy right is right in property and not a personal right.

An occupancy right is a right in property and such a right does not revert to the landlord on the death of the occupancy tenant, but devolves upon the heir of the tenant as if it were land: 4 P. L. J. 354, *Foll.* [P 71 C 1]

(b) C. P. Tenancy Act (1920), S. 12—Occupancy tenant cannot dispose of his holding by will.

So far as the Central Provinces are concerned a tenant has no right to make a testamentary disposition in respect of his occupancy holding: 2 C. P. L. R. 167 and A. I. R. 1926 Nag. 222, *Foll.*; 15 C. P. L. R. 1, *Rel. on.*; A. I. R. 1929 Pat. 734, *Ref.* [P 72 C 1]

*D. P. Das Gupta—*for Appellants.

*S. C. Chatterji and A. Dutta—*for Respondents.

Kulwant Sahay, J.—This is an appeal by defendants 1 and 2 against the decree of the Subordinate Judge of Sambalpur modifying the decree of the Munsif and decreeing a portion of the plaintiff's claim. The suit was for a declaration of the plaintiff's title to the estate left by one Gobind Naik as his next reversionary heir. Gobind Naik died leaving a will, dated 24th June 1905, bequeathing his properties to his youngest daughter Mt. Siria. He had three other daughters, one of whom died without issue and the remaining two are defendants 6 and 7 in the suit. Mt. Siria died leaving two daughters who are the appellants in this appeal. The husband of Mt. Siria and the husbands of the two daughters are defendants 5, 3 and 4 respectively. The plaintiff's case is that the will conferred only a life interest on Mt. Siria and that after her death he, as the next reversionary heir, was entitled to succeed, and

that the daughters of Mt. Siria, her husband and her daughters' husbands, who are in possession of the properties, have no title thereto. The remaining two daughters of Gobind Naik, viz., defendants 6 and 7, have no objection to the suit being decreed in favour of the plaintiff. The suit was contested by defendants 1 to 5 and their case was that by the will an absolute estate was bequeathed to Mt. Siria and that on her death her daughters are the legal heirs entitled to the property.

Both the Courts below have construed the will as bequeathing an absolute estate upon Mt. Siria, and this finding is not questioned in this second appeal, the plaintiff being content with that finding. The Munsif dismissed the suit altogether. On appeal however the learned Subordinate Judge has given a modified decree in favour of the plaintiff in respect of the raiyati lands held by Gobind Naik and bequeathed under the will to Mt. Siria. The will related to bhogra lands, to certain houses and to raiyati lands. As regards the bhogra lands and the house property the learned Subordinate Judge has found that the will was operative, but as regards the raiyati lands he was of opinion that a raiyat had no right to bequeath his occupancy right by will under the provisions of the Central Provinces Tenancy Act. It is against this finding of the Subordinate Judge that the appellants have come up in appeal to this Court, and the sole question for consideration is whether raiyati holdings can be bequeathed by will by a raiyat under the Central Provinces Tenancy Act.

The relevant section of the Act, which is Act 11 of 1898, is S. 46. Sub-S. (1) of this section provides that when an occupancy tenant dies his right in his holding shall devolve as if it were land. It is contended on behalf of the appellants that the interest of an occupancy tenant under the Central Provinces Tenancy Act is similar to the interest of occupancy tenants under the Bengal Tenancy Act, and, as it has been held under these two Acts that the interest of an occupancy tenant in his holding is not a personal interest, but the interest in property like any other property therefore as under the Bengal Tenancy Act an occupancy raiyat has the right to make a will in respect of his occupancy holding, a raiyat

under the Central Provinces Tenancy Act has also the right to make a will in respect of his holding. That an occupancy raiyat under the Chota Nagpur Tenancy Act has the right to make a valid testamentary disposition of his occupancy holding was held by a Division Bench of this Court in *Mt. Kishuni Kuar v. Andu Mahton* (1). The learned advocate for the respondents however contends that this ruling has no application to occupancy tenants under the Central Provinces Tenancy Act, and he has referred to certain provisions of the Act and compared them with the similar provisions in the Chota Nagpur Tenancy Act, and the Bengal Tenancy Act. He has also referred to certain decisions under the Central Provinces Tenancy Act and has contended that so far as the Central Provinces are concerned the law is settled that an occupancy raiyat has no right to make a valid testamentary disposition of his holding. He has also referred to the preambles of the Bengal Tenancy Act and the Chota Nagpur Tenancy Act, while the latter two Acts purport to amend and consolidate certain enactments relating to the law of landlord and tenant, the Central Provinces Tenancy Act does not purport to amend and consolidate the law relating to landlord and tenant but to consolidate and amend the law relating to agricultural tenancies in the Central Provinces, and the learned advocate for the respondents contends that the Central Provinces Tenancy Act, is not an Act which merely regulates the relationship existing between the landlords and tenants, but prescribes a complete code relating to agricultural tenancies.

After a careful consideration, I am of opinion that the arguments of the learned advocate for the respondents are sound and ought to prevail. As was observed in *Sukuru Mali v. Sri Brahmapura Balabhadra Mahaprabhu* (2), the dictum that an occupancy right is a personal right is now an exploded theory even in the Central Provinces. It is a right in property and under the express terms of S. 46 such a right does not now revert to the landlord on the death of the occupancy tenant, but devolves upon the heir of the tenant as if it were land.

The occupancy tenant has the right to sell, make a gift of mortgage and sublet his right in his holding under certain restrictions. There is nothing in the Central Provinces Tenancy Act to restrict the powers of the occupancy tenant to make a testamentary disposition of his right in his holding. Ordinarily therefore it would appear that he would have such a right, but there are differences in the provisions of the Chota Nagpur Tenancy Act and the Bengal Tenancy Act on the one hand and the Central Provinces Tenancy Act, on the other. S. 23, Chota Nagpur Tenancy Act, provides that if a raiyat dies intestate in respect of a right of occupancy it shall descend in the same manner as other immovable properties, subject of course to any local custom to the contrary. This implies that a raiyat can make a testamentary disposition in respect of a right of occupancy. There is a similar provision in the Bengal Tenancy Act: see S. 26 of the Act. There is no such provision in the Central Provinces Tenancy Act. It was held so far back as the year 1887 by the Judicial Commissioner of the Central Provinces that an occupancy tenant cannot transfer his right in his holding by will, *Mt. Laxmi Bai v. Alyar Khan* (3). This was under the old Tenancy Act of 1883. The Tenancy Act has since then been amended several times. Act 11 of 1898 was amended so recently as the year 1920 by Act 1 of 1920. Since the decision of the Judicial Commissioner in *Mt. Laxmi Bai's* case (3) the Courts in the Central Provinces have taken the same view consistently throughout. In *Shecdyal v. Rewa Prasad* (4) the Judicial Commissioner of Nagpur, while considering this question observed as follows:

"As far back as in 1887, Crosthwaite, J. C., with reference to S. 43 of the old Tenancy Act of 1883, then in force held in *Laxmi Bai v. Alyar Khan* (3) that an occupancy tenant could not make any disposition of his tenant's right by will. Had this view been erroneous the statute which has been changed twice since then would have surely undergone a change in this respect so as to clothe the tenant with a right to make a bequest of his tenant's right. The question had arisen again in 1901 in connexion with the powers of an absolute occupancy tenant to make a testamentary disposition of his right in the holding and it was held by Ismay, J. C., in *Anadi Bai v. Harlal* (5) that a

(1) A. I. R. 1929 Pat. 734=120 I. C. 300.

(2) [1919] 4 Pat. L. J. 354=51 I. C. 896.

(3) [1889] 2 C. P. L. R. 167.

(4) A. I. R. 1926 Nag. 222=90 I. C. 247.

(5) [1902] 15 C. P. L. R. 1.

will by an absolute occupancy tenant was in valid. This case was apparently under the Tenancy Act, 1898. Since then there has been a change and the 'new' Tenancy Act of 1920 has appeared in the Statute Book, but we do not find any change which would vest a devisable interest in the tenant of the Central Provinces. This clearly supports the argument that the legislature thinks that the statute has all along been rightly interpreted by the Court of the Province in this matter."

This is if I may be permitted to say so a sound view to take, and it must be held that so far as the Central Provinces are concerned it is a settled law that a tenant has no right to make a testamentary disposition in respect of his occupancy holding. It is for the legislature to consider whether such an interpretation of the law is correct or not and whether the law requires any amendment in this respect. So long as this is not done, the Courts are bound by the *cursus curiae* so far as the Central Provinces are concerned.

I am therefore of opinion that the view taken by the learned Subordinate Judge is correct and this appeal must be dismissed with costs.

Courtney-Terrell, C. J.—I agree.

B.V., R K.

Appeal dismissed.

A. I. R. 1932 Patna 72

MOHAMMAD NOOR, J.

Raghunath Puri and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 275 and 276 of 1931, Decided on 12th August 1931, from order of Sess. Judge, Gaya, D/- 8th June 1931.

(a) Criminal P. C. (1898), S. 4 (b)—Allegations not stated in complaint are not complaint.

The allegations of other matters, besides those mentioned in the complaint, do not constitute a complaint within the meaning of that term as defined in the Code. [P 75 C 1]

(b) Criminal P. C. (1898), Ss. 173 (1), 190 and 204—Charge sheet, what is—S. 204 applies even when cognizance is taken on police report and Magistrate can issue process for appearance of accused.

There is no provision for a charge sheet in the Code. Charge sheet is a form provided under Departmental rules of the Government presumably under S. 173 (1) (a). S. 173 (1) (a) requires the police to submit to a Magistrate empowered to take cognizance of an offence on a police report—meaning a Magistrate empowered under S. 190 (b)—a report in the form prescribed by the Local Government. The Government have prescribed two forms. One is called charge

sheet to be used when the accused is sent up for trial and the other is called "final report" which is used when the accused is not sent up for trial. When such a report is received by the Magistrate empowered under S. 190 (b) he takes cognizance of the offence under that section. Even if the accused is not sent up, i.e., not a charge-sheet but a final report is sent, the Magistrate when he applies his mind to that report may take cognizance of the offence and if he wants to place the accused on trial he can issue his process. This he can only do under S. 204. S. 204 does not apply only when cognizance is taken on a complaint but also when cognizance is taken on a police report. A Magistrate empowered under S. 190 (a) and (b) can issue his process for compelling the appearance of the accused on the perusal of the police report submitted to him under S. 173 declaring the case to be false. He can also do the same on perusal of police report submitted to him after an inquiry under S. 202 on case of a complaint. In both the cases he will be acting under S. 204, the only section authorizing the Magistrate in any case to proceed against the accused. In one case if the report is under S. 173, he will be disposing of that report; and in the other case if there is a complaint he will be disposing of the complaint.

An order which is passed by the Magistrate empowered under S. 190 (b) when disposing of a police report under S. 173, is a judicial order. It is an order under S. 204. It is nothing but a short way of saying: "I give you warrant to arrest the accused, send them up either in custody or on bail according to the nature of the offence." It is a mode of issuing process for compelling the attendance of the accused which has come into practical use.

[P 76 C 2, P 77 C 1]

An order calling for a charge-sheet on a report under S. 202, when the police drew up a first information report is an order under S. 204 and in practice is an order for issue of process: *A. I. R. 1928 Cal. 24*; *A. I. R. 1929 Bom. 72* and *A. I. R. 1928 Pat. 359, Discussd*; 67 I.C. 499, *Diss. from*. [P 78 C 1]

If the inquiry is held by a Magistrate or a police officer his power to arrest without a warrant remains intact: *A. I. R. 1923 Pat. 547, Appr.* [P 78 C 2]

(c) Criminal P. C. (1898), Ss. 190 and 191—High Court will interfere when accused is prosecuted without material justifying trial.

Ordinarily if the Magistrate has ordered an accused to be tried, the trial must proceed. But when the High Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will be abdicating its function if it did not interfere to stop patent injustice calling for a prompt redress: 26 Cal. 786, *Ref.* [P 78 C 2]

(d) Criminal Trial—Duty of Court—Administration of justice can be done only by particular procedure.

The Court has to administer the law as it stands and not as it likes it to be. The legislature in their wisdom have provided procedure by which alone a man can be placed upon his trial. First of all a Magistrate must take cognizance of an offence and that he can do only in one of three ways, viz., (1) on a com-

plaint (2) on a police-report or (3) on his own information. Therefore there must be some material before the Magistrate showing that the accused has committed the offence. These precautions have been provided by the legislature in order to save persons from useless prosecution. [P 80 C 1]

*Ali Imam, Manohar Lall, N. K. Prasad II and Chaudhury M. Prasad—*for Petitioners.

*Govt. Advocate—*for the Crown.

Judgment.—These cases along with Criminal Revisions Nos. 331 and 332 and Criminal Miscellaneous Case No. 36 of 1931 arise out of a dispute which has cropped up about the succession and possession of a certain mutt called Mudra situated within the Gobindpur police station of the Nawadah Subdivision in the district of Gaya and the properties appertaining to it lying in Gaya and Monghyr. The admitted mohunt of the mutt was one Tokhnarain Puri who died on 12th August 1930. The rival claimants to the gaddi are Premnarain Puri on the one hand and Raghunath Puri on the other.

The case of Premnarain Puri is that on the death of Tokhnarain Puri he was formally installed as a mohunt of the Mudra mutt which has also a branch at Dhondha, with the full approval and help of the Mohunt of Budhauri Ramdhan Puri. Some time in March 1931 he fell ill and went for treatment to Gaya. During his absence Raghunath Puri, who was only his servant, surreptitiously obtained possession of the key of the treasury and proclaimed himself mohunt of the mutt and since then, has been adopting various illegal methods to dispossess him (Premnarain Puri) from the mohuntship of the Mutt and the properties appertaining to it which are admittedly very valuable and are said to consist besides moveables landed properties yielding an income of Rupees 60,000 per annum. The case of Raghunath Puri on the other hand is that he is the real mohunt who succeeded Tokhnarain Puri and that Premnarain Puri was his servant who fraudulently got his name entered in the collectorate register and has been posing himself as a mohunt. In short each of the two rival claimants asserts himself to be the real mohunt and calls his adversary a disloyal and dishonest servant who has raised a standard of revolt against his

master. Each claims to have obtained peaceful possession of the properties and charges the other with attempts to dispossess him.

The litigation started with a petition sent by Premnarain some time about 8th March 1931 to the Superintendent of Police, Gaya, who deputed some constable to the Mudra mutt, and a police inquiry held in consequence of this petition led to the institution at Nawadah of a case under S. 107, Criminal P. C., against Raghunath Puri and others in which Mohunt Ramdhan Puri and his manager Dhaneshwar Prasad have also been impleaded as being the real persons at the bottom of the trouble and as helpers and abettors of Raghunath Puri. It is said by the police that when Premnarain Puri was installed as a mohunt he promised to make over the cash of the treasury to Ramdhan Puri. Premnarain backed out of his promise and therefore Mohunt Ramdhan Puri has become his enemy and has set up Raghunath Puri as a rival claimant to the gaddi of Mudra mutt and has been helping in dispossessing Premnarain Puri. The case under S. 107, Criminal P. C., pending before the Subdivisional Officer of Nawadah is the subject-matter of Criminal Revisions Nos. 331 and 332 of 1931. In the meantime some associates and partisans of Raghunath Puri are alleged to have committed criminal trespass into a house at Nawadah appertaining to the Mudra mutt. They have been prosecuted under S. 455, I. P. C. and this case is also pending before the Subdivisional Officer of Nawadah and an application to this Court for its transfer from the district is the subject-matter of Criminal Miscellaneous Case No. 36 of 1931. There was another case under S. 144, Criminal P. C., in respect of a village called Sukho Deora appertaining to the same mutt. One Maulvi Malik Mokhtar Ahmad claimed to have taken a lease of this village from Premnarain Puri and alleged disturbance by Raghunath Puri. The Subdivisional Officer of Nawadah by an order passed under S. 144, Criminal P. C., (which was made absolute on 27th May 1931) directed the men of Raghunath Puri to vacate the kutchery of the village. Since then proceedings under S. 107, Criminal P. C., have been started against the parties. I now come to the facts of the present case.

On 14th March 1931 one Ramdeo Singh a servant of Premnarain Puri, filed a petition of complaint before the Subdivisional Officer of Nawadah and, on this complaint and on the report of the police on that complaint the petitioners Raghunath Puri and others (including Ramdhan Puri and his manager Dhaneshwar Prasad) have been placed upon their trial. In these cases this Court is asked to quash the proceedings of the prosecution. It is necessary that I should deal with the facts of this complaint and the various steps taken by the learned Subdivisional officer rather in detail. The petition of complaint is in Hindi. It is against five persons only namely Raghunath Puri, Ramdhari Singh Baijnath Puri, Rajkumar Singh and Shankar Kahar, inhabitants of Mauza Mudra, Thana Gobindpur. The date of the occurrence is mentioned as 14th March 1931, the very date on which the petition was filed. It said that the complainant was a servant of Premnarain Puri who being indisposed had gone to Gaya for treatment.

In his absence the accused were causing undue interference in the Mudra mutt for which proceedings had separately been taken. Then it said that the complainant went to Mudra under the orders of his master. Seeing him, Raghunath Puri became very much annoyed and directed his servants to shoot him, on which the other accused persons chased the complainant. The complainant thereupon went to the police who were deputed there but they did not give him any help. The accused persons threatened the complainant. There is not one word in this petition which refers to any criminal offence having been committed by anybody except the five persons named in it and that also on the 14th March when there was a criminal intimidation and assault by chasing the complainant. There is nothing in this petition about criminal trespass or conspiracy. The names of Mohunt Ramdhan Puri and his manager Dhaneshwar Prasad are not even suggested. However the Subdivisional Officer examined the complainant on oath, and in this examination the following are the only passages suggesting the commission of any criminal offence:

(1) "During his (Premnarain Puri's) absence Raghunath Puri entered into a conspiracy with

the tenants and made preparations to dispossess Premnarain Puri.

(2) Raghunath Puri and others occupied the mutt at Mudra by force during the absence of Premnarain Puri.

(3) He (Raghunath Puri) and his colleagues are now changing the rent receipts granted to tenants by Mohunt Premnarain.

(4) They (presumably referring to Raghunath Puri and his colleagues not named) have also removed certain articles from the mutt. They have broken open one room by forcing the lock.

(5) They (perhaps again referring to Raghunath Puri and his men) have taken the key of the treasury in their possession.

(6) The story of intimidation and chase mentioned in the written complaint."

The learned Subdivisional Officer referred the complaint to the police for investigation. The police treated the complaint as a first information, filled up the required forms, and investigated the case presumably under Ch. 14, Criminal P. C., and submitted a report in the prescribed form declaring the case to be false. The police found that what really happened was that the complainant with a few companions of his went on a taxi car to Mudra and wanted to enter the mutt. The gatekeepers did not allow them to enter and there was some altercation. The complainant magnified this into an occurrence. The police further stated that as the two parties Premnarain and Raghunath were fighting over the possession of the mutt, cases of this nature were likely to happen often. It is to be noted that the officer in charge of the police station investigated the case under the supervision of the Divisional Inspector and the Deputy Superintendent of Police and the final report was submitted under the orders of the Superintendent of Police. In the meantime, on 31st March, the complainant had filed a petition expressing his suspicion against the police because the accused were helped by the Mohunt of Budhauri, and the latter and his men were fabricating false documents and changing receipts of the tenants. This was for the first time that the name of the Mohunt of Budhauri came in the proceedings. When the police report came the learned Magistrate was not satisfied with it and on 10th April 1931 wrote a note on the report and ordered a fresh inquiry. It will be desirable to mention that the police confined their investigation to the occurrence alleged to have taken place on 14th March 1931. They were apparently not wrong. First

of all the petition of complaint, as I have already stated, made absolutely no mention of any criminal offence having been committed by anybody prior to the date of occurrence (14th March 1931). Secondly, even in the statement on oath of the complainant, the basis of the complaint is the occurrence of 14th March.

The series of incidents mentioned do not appear to be the basis of the complaint, because it was too indefinite and except Raghunath Puri nobody was mentioned in connexion with them. Facts were not mentioned to enable the Magistrate to take steps on them. The complaint is defined in S. 4 (h), Criminal P. C. "Complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, etc. The written petition filed made absolutely no mention of anything else than the occurrence of 14th March and it is very difficult to construe the statements on oath as if they were made with a view to the Magistrate's taking action on them. The learned Sessions Judge, when he was asked to refer the matter to this Court for the quashing of proceedings, was of opinion that the allegation of other incidents besides that of the occurrence of 14th March was not a complaint, and I agree with him. On reading the complaint and even the statement on oath the Police Sub-Inspector, whose investigation was supervised by the Inspector of Police and the Deputy Superintendent of Police, was not wrong in concluding that the complaint referred to the incident of 14th March only. I have said that the learned Magistrate wrote a note on the final report of the police. This note requires rather a detailed examination as its language and observations have been subjected to a severe attack by Sir Ali Imam who has appeared on behalf of two of the petitioners.

The learned Magistrate remarked:

"that the investigation was not properly made, that it was a matter of common knowledge of everyone who was in touch with the administration of criminal justice in this country that complaints were usually exaggerated before they reached the police or the Court."

He then analyzed the complaint into following elements: (1) that Premnarain Puri is the Mohunt of Mudra; (2) that Raghunath Puri, his manager committed

the theft of the key of the Mudra Treasury; (3) that Raghunath Puri and others conspired to oust Premnarain from his possession over the Mudra mutt and its properties; (4) that Raghunath Puri occupied the mutt at Murda and declared himself to be the Mohunt; (5) that he committed the offence of house trespass after having made preparations to cause hurt; that he and others made preparation to obstruct the lawful entry of Mohunt Premnarain in the mutt and (6) that on a certain date Ramdeo Singh, who entered the mutt on behalf of Premnarain Puri, was intimidated and chased away. He then found fault with the police for their having confined themselves to No. 6 only and not arriving at any finding on the other points. He then said:

"The inquiry should be completed as early as possible and report should be submitted to me within a week. The atmosphere is surcharged with dangerous possibilities and still the police are taking months in the submission of their report."

This criticism of the police was in my opinion unjustified. The investigation was ordered on 14th March and the Police report which is dated 2nd April 1931 was submitted to the Subdivisional Officer by the Inspector on 6th April. In my opinion the investigation which was supervised by the Divisional Inspector and the Deputy Superintendent of Police did not take such an unusually long time as the learned Magistrate seems to think. The Magistrate further said:

"I am sending a copy of my remarks to the S. P. and the District Magistrate for information. I would also request the S. P. to supervise the case personally if he can find time to do so. The matter is indeed very serious the property involved being worth lakhs and lakhs. It would be a fit case in which the highest police officer in the district may watch the proceedings himself."

Sir Ali Imam contends that in this note there are matters which were neither in the written complaint nor in the statement on oath nor in the police report and that the Magistrate introduced facts from his extra-judicial knowledge and that by unduly criticizing the police and showing some warmth in the language the learned Magistrate practically hinted what the police was to do in the matter.

There is no doubt that this note contains matters which are not to be found in the records of the present case. The

learned Magistrate had before him the written complaint of Ramdeo Singh, his statement on oath, his petition of protest and the police report declaring the incident of 14th March to be false. The learned Magistrate analyzed the "complaint filed." If he meant by the "complaint filed" the written complaint, then it contained nothing except the incident of 14th March 1931. But if he meant the statement on oath even then there are certain matters in the note which are not to be found in that statement and in my opinion the learned Magistrate could with advantage have avoided the little warmth which he has shown in his note and which has created apprehension in the mind of the accused. At the same time in fairness to the learned Magistrate I must say that he did not introduce any extra-judicial information. It will be recalled that when Premnarain Puri sent a petition to the Superintendent of Police an inquiry was held and a report under S. 107, Criminal P. C. was submitted. That case was pending before the learned Subdivisional Magistrate and the facts contained in his note of the 10th seems to have been taken some from the report, some from the arguments in that case which was partly heard and discussed on 25th March 1931 and some from another criminal case which was being heard. In my opinion the learned Magistrate somewhat confused the facts which came to his knowledge in S. 107 case and in another criminal case with the facts of the present complaint and much cannot be made of this.

Though the learned Magistrate ordered a further inquiry (as he says) into the complaint in fact he ordered inquiries about incidents which though not the basis of the complaint were mentioned by the complainant leading to the occurrence of 14th March 1931. The police made further investigation and submitted a supplementary report on which the learned Magistrate on 4th May ordered the submission of charge-sheets against Raghunath Puri, Ramdhari Singh, Baijnath Puri, Rajkumar Singh and Shankar Kahar under S. 452, I. P. C., and under S. 452/114 against Dhaneshwar Prasad. Later on he ordered submission of charge sheet against Mahunt Ramdhan Puri of Budhauri also under S. 452/109, I. P. C. In these cases this Court is asked to set

aside this order of calling of charge sheets and to quash the entire proceedings. Application to the Sessions Judge to refer the case to this Court were refused.

It is contended that as there was a complaint the learned Magistrate had no power to order the submission of charge-sheet and ought to have disposed of it under S. 203 and S. 204, Criminal P. C. Reliance has been placed upon the cases of *Isaf Nasya v. Emperor* (1), *Emperor v. Haji Nur Muhammad* (2) and the observations of Jwala Prasad, J., in the cases of *Rampabittar Singh v. Kasim Ali Khan* (3) and *Ulfat Khan v. Emperor* (4). In my opinion except for the observation in *Rampabittar's* case (3) none of the cases is an authority to show that the Magistrate in this case was not empowered to order a charge sheet.

First of all there is no provision for a charge-sheet in the Criminal Procedure Code. Charge sheet is a form provided under departmental rules of the Government presumably under S. 173 (1) (a), Criminal P. C. That section requires the police to submit to a Magistrate empowered to take cognizance of an offence on a police report—meaning a Magistrate empowered under S. 190 (b)—a report in the form prescribed by the Local Government. The Government have as it appears prescribed two forms. One is called charge-sheet to be used when the accused is sent up for trial and the other is called "final report" which is used when the accused is not sent up for trial. When such a report is received by the Magistrate empowered under S. 190 (b) he takes cognizance of the offence under that section. Even if the accused is not sent up, i.e., not a charge-sheet but a final report is sent, the Magistrate when he applies his mind to that report may take cognizance of the offence and if he wants to place the accused on trial he can issue his process. This he can only do under S. 204, Criminal P. C. S. 204 does not apply only when cognizance is taken on a complaint but also when cognizance is taken on a police report. This is the first section of Ch. 17 headed

(1) A. I. R. 1928 Cal. 24=102 I. C. 515=28 Cr. L. J. 577=54 Cal. 303.

(2) A. I. R. 1929 Bom. 72=117 I. C. 329=30 Cr. L. J. 781=53 Bom. 339.

(3) [1920] 67 I. C. 499=23 Cr. L. J. 403.

(4) A. I. R. 1928 Pat. 359=108 I. C. 333=29 Cr. L. J. 374.

"Of the commencement of proceedings before Magistrates." A Magistrate empowered under S. 190 (a) and (b) can issue his process for compelling the appearance of the accused on the perusal of the police report submitted to him under S. 173, Criminal P. C., declaring the case to be false. He can also do the same on perusal of the police report submitted to him after an inquiry under S. 202 in case of a complaint. In both the cases he will be acting under S. 204, the only section authorizing the Magistrate in any case to proceed against the accused. In one case, if the report is under S. 173, he will be disposing of that report, and in the other case if there is a complaint he will be disposing of the complaint.

Now an order for submission of a charge-sheet may be an executive order or a judicial order. In the former category is the order which is sometimes passed by superior police officers and sometimes by Magistrates to their subordinates engaged in the investigation and before the final report is submitted under S. 173. It is an executive direction of an officer to his subordinate whether or not the accused should be sent up for trial. If the order is for submission of a charge-sheet it only means that superior officers direct the subordinate police officers to send the case for trial.

In the second category is the order which is passed by the Magistrate empowered under S. 190 (b) when disposing of a police report under S. 173, Criminal P. C. In my opinion it is an order under S. 204, Criminal P. C. It is nothing but a short way of saying:

"I give you warrant to arrest the accused, send them up either in custody or on bail according to the nature of the offence."

It is a mode of issuing process for compelling the attendance of the accused which has come into practical use.

In this case there was a complaint sent to the police for inquiry under S. 202. The police had drawn up a first information on that complaint and submitted a report in the prescribed form. It is immaterial whether we hold this to be a report under S. 202 or S. 173, Criminal P. C. The Magistrate who had taken cognizance of the complaint was also empowered to take cognizance under S. 190 (b). He was empowered to order further inquiry. When the sup-

plementary report came he had again full power to act under S. 204, no matter whether the report was under S. 202 or S. 173. The order for a charge sheet was practically a warrant under S. 204. If there was any technical irregularity it was rectified by the issue of warrants against the accused on 9th June 1931. In the Calcutta case referred to above the District Magistrate took cognizance of the case on a complaint and ordered the police to send up a charge sheet to another Magistrate (Sub-Divisional Magistrate) if the case was found to be proved. The police found the case proved and submitted the charge-sheet to the Subdivisional Magistrate of Nilphamari.

The result was that the complaint before the District Magistrate remained undisposed of, and the District Magistrate who was under the law bound to dispose of it either under S. 203 or S. 204 was deprived of the opportunity to do so. The High Court directed the District Magistrate to dispose of the complaint according to law. Similar were the circumstances in the Bombay case. There also the police of their own accord submitted a charge-sheet which was placed before a Magistrate other than the one who had taken cognizance of the offence on a complaint and the former held that the accused were not properly before him and discharged them. This order was upheld by the High Court. In these two cases the police submitted a charge-sheet on their own accord without having been directed to do so by the Magistrate before whom the complaint was pending. In the present case it has been ordered by the Magistrate before whom the complaint was made and who had ordered the inquiry. The observation of Jwala Prasad, J., in *Rampabitar Singh v. Kasim Ali Khan* (3) looks rather supporting the view urged by the learned advocate for the petitioners (Mr. Manohar Lal) that the Magistrate had no power to order a charge sheet. But a careful reading of the judgment will show that his Lordship's decision was not so much based upon the powers of the Magistrate to order a charge-sheet as upon the facts and circumstances of that case. There, after an inquiry the police reported the case to be false.

The Magistrate ordered a charge-sheet. Then his Lordship observed that the basis of the Magistrate's order was the

police report which did not justify him in calling for a charge-sheet. No doubt his Lordship observed that no order for submitting a charge-sheet could be made by the Magistrate. The Magistrate could only pass an order under S. 203 or S. 204, Criminal P. C., and therefore the order of the Magistrate was ultra vires. It is respectfully submitted that an order calling for a charge-sheet on a report under S. 202 when the police drew up a first information report is an order under S. 204, Criminal P. C., and in practice is an order for issue of process. If the Magistrate on a perusal of the police report submitted under S. 202, Criminal P. C., orders the issue of a warrant of arrest for the production of the accused I fail to understand why he cannot achieve the same object by ordering the police to send up the accused for trial. Then this judgment of Jwala Prasad, J., was prior to the amendment of the Criminal Procedure Code. The new S. 190 (b) has been so amended as to authorize a Magistrate to take cognizance of an offence on any police report. Report of the police after an inquiry under S. 202, Criminal P. C., is after all a police report and comes within S. 190 (b). If the Magistrate is applying his mind to a report submitted by the police after an inquiry under S. 202, I think he is at one and the same time applying his mind to the facts of the complaint as well as to the facts disclosed in the report. Then again I see absolutely no reason why the police, when they got the complaint, could not treat the complaint as an information and act upon it independently of the magisterial orders. A written complaint signed by the complainant supported by a statement on oath made before a Magistrate is before the police. Why can they not treat it as a first information of a cognizable offence? Supposing for instance a Magistrate receives a complaint of an offence of murder. He sends it to the police for investigation. Can it be said that if the police are satisfied that a man has committed murder they are not entitled to arrest him or to send him to the Magistrate? S. 202 (2) says:

"If an inquiry or investigation under this section is made by a person not being a Magistrate or a Police Officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police station, except

that he shall not have power to arrest without warrant."

This clearly indicates that if the inquiry is held by a Magistrate or a police officer his power to arrest without a warrant remains intact. I respectfully agree with the view expressed by Mullick, J., in the case of *Emperor v. Bhola Bhagat* (5). In my opinion because a complaint has been sent to a police officer to investigate a case, it does not deprive the police of their rights to investigate a cognizable offence independent of the complaint. Nor do I think that if a Magistrate has taken cognizance of an offence on a complaint he is deprived of his power of taking cognizance of connected offences on a police report. The only thing which the law requires is a final disposal of the complaint lodged before a Magistrate; and this has been done in this case. As the learned Magistrate was empowered to take cognizance both on a complaint and on a police report and the complaint was pending before him, I am not prepared to set aside his order on this ground. It is not necessary that the Magistrate should always record under what provisions of law he was proceeding.

Now I take up the question whether the learned Magistrate had any material for the issue of a process. Ordinarily if the Magistrate has ordered an accused to be tried, the trial must proceed. But when this Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will be abdicating its function if it did not interfere to stop patent injustice calling for a prompt redress: see *Jagat Chandra Mazumdar v. Queen-Empress* (6). I wish to examine the case of each of the petitioners separately.

Mahanth Ramdhan Puri of Budhauri.

I will confine myself to the materials which were legally before the Magistrate. They were five in number; (1) the written complaint of Ramdeo Singh; (2) his statement on oath before the Magistrate; (3) the petition of protest by the complainant; (4) the first police report and (5) the supplementary police report. In the first three there is absolutely no mention of Mahanth Ramdhan Puri, not

(5) A. I. R., 1923 Pat. 547=72 I. C. 375=24 Cr. L. J. 375=2 Pat. 379.

(6) [1899] 26 Cal. 786=3 C. W. N. 191.

even an insinuation against him. In the fourth the only allegation against him is that he is a helper of Raghunath Puri and he and his men are trying to change the receipts. It discloses an offence of fabricating false evidence. This statement was not supported by oath and at any rate has no connexion with abetment of house trespass and the material placed before the Court is so meagre and so indefinite that no action can be taken upon it. Then last is the supplementary police report. In this the accusations against the Mahanth of Budhauri are the following :

(1) That at his suggestion the manager Raghunath Puri was sent to Gaya from the Mudra mutt through the accused Ramdhari Singh. Premnarain Puri made over to him the key of his cash box and made over to him the charge of domestic affairs etc.; (2) it was decided at the instance of the Budhauri Mahanth to take Premnarain Puri to succeed him (Tokhnarain Puri). This being done the Budhauri Mahanth wanted certain concession from Premnarain Puri, one of which was that the treasure left behind by Mahanth Tokhnarain Puri should be made over to him, etc. After Premnarain Puri went back on his promise to deliver the treasure of Budhauri Mahanth, ill-feeling arose between them but the latter did not give vent to his feeling and continued to be on friendly terms with the former although he cherished hatred for him and had been apparently on the look out to avenge himself upon him as best as he could. This hardly discloses commission of any offence. However objectionable the conduct of the Mahanth of Budhauri might have been—an attempt to make profit in the bargain and to get angry and vindictive when that attempt fails may be bad—but we are not moral preceptors. It is possible that this ill-feeling might have induced the Mahanth of Budhauri to give his help to Raghunath Puri, but every help to Raghunath Puri is not necessarily an offence; (3) that a case under S. 452, I. P. C. was instituted against Premnarain Puri by one Paro Dhanuk of Budhauri, a domestic servant of the Mahanth of Budhauri. The case was found to be false. There seems to be an insinuation though not an assertion that the Mahanth of Budhauri was an abettor in the institution of this false case.

These can hardly be sufficient to place him upon his trial for abetment of an offence of house trespass in the mutt at Mudra. The learned Sessions Judge in his order refusing a reference to this case has said that there are insinuations against the Mahanth of Budhauri. In my opinion no man should be placed upon his trial unless there is a definite assertion of facts against him which, if believed, may lead to conviction. Even if every word said against Ramdhan Puri is true, it will be impossible to convict him of abetment of house trespass.

Dhaneshwar Prasad

The only allegation against him is that he was present when Raghunath Puri took chaddar (a ceremony of assumption of Mahantship). First of all a ceremony of assumption of Mahantship by itself is not an offence. Then it is not clear where it was performed. Raghunath Puri was living in the mutt and in the petition of complaint he is described as a resident of Mudra. If one day he declared himself as the Mahanth or a rival of his master and Dhaneshwar was present at the occasion or even helped him in doing so, I do not think this can be said to constitute an offence under S. 452/114, I. P. C. It is to be noticed that the police suggested the prosecution of Ramdhan Puri and Dhaneshwar Prasad under S. 120-B, I. P. C. and they did not mention a word about their having abetted the offence of criminal trespass. The learned Magistrate was also for some time of the same view. The various conflicting orders which I find on pp. 1 and 2 of the supplementary report at the end of it changed one after the other show the difficulties the learned Magistrate felt in ordering the prosecution of these two men and in my opinion his earlier doubts were well founded.

Ramdhari Singh, Baijnath Puri, Rajkumar Singh and Shankar Kahar

Excepting in the petition of complaint and in the statement on oath I do not find their names mentioned anywhere in connexion with any offence. In these they have been accused for the alleged occurrence of 14th March 1931 which was found by the police to be false, a finding which seems to have been accepted by the Magistrate. I fail to under-

stand on what materials he has proceeded against them under S. 452, I. P. C.

Raghunath Puri

There are allegations against him in the complaint, in the statement on oath and in the supplementary police report which disclose the commission of some offence of house trespass by him. In my opinion his prosecution should stand. Mr. Manohar Lal contends that trespass, if any was of a civil nature. This is however a matter for trial. The prosecution of Ramdhan Puri, Dhaneshwar Prasad, Ramdhari Singh, Baijnath Puri, Rajkumar Singh and Shankar Kahar must be set aside. While I have ordered this I entirely appreciate the point of view of the learned Magistrate. Perhaps he felt what may be called a righteous indignation at the alleged conduct of Raghunath Puri possibly helped by the Mohanth of Budhauri. The circumstances before him showed *prima facie* that the former was in the wrong and there were insinuations also against the latter. We are however bound by law, and the circumstances may be capable of explanations. We have to administer the law as it stands and not as we like it to be. The legislature in their wisdom have provided procedure by which alone a man can be placed upon his trial. First of all a Magistrate must take cognizance of an offence and that he can do only in one of three ways: (1) on a complaint; (2) on a police report or (3) on his own information. Therefore there must be some material before the Magistrate showing that the accused has committed the offence. These precautions have been provided by the legislature in order to save persons from useless prosecution. No doubt in spite of them cases have occurred in which innocent persons have been convicted. On the other hand there are cases in which by the observance of procedure guilty ones escaped punishment but in spite of this we must administer the law as it stands. Cases are not rare in which we find our private feelings in sympathy with the accused but we have to convict and punish him. On the other hand we feel indignant at the conduct of certain accused but have to let him off. In this case it is my considered opinion that the learned Magistrate had nothing else in view but the maintenance of law and order in his

subdivision. He ordered the prosecution of some men without there being any material before him and I feel it my duty to intervene.

Criminal Revision No. 275 is partly allowed and I direct the order of the Magistrate calling for charge sheets against Ramdhari Singh, Baijnath Puri, Rajkumar Singh and Shankar Kahar be set aside and they will be discharged from their bail. Raghunath Puri will be tried, but taking into consideration the various orders passed by the Magistrate not in this case but also in connected cases and which I shall deal in Criminal Miscellaneous Case No. 36 of 1931 and without any reflection upon the learned Magistrate I think that in the ends of justice he should be tried by some other Magistrate. I transfer the case to the file of the District Magistrate of Gaya who will either try it himself or make it over to such other Magistrate competent to try the case as he thinks fit. Raghunath will remain on bail as already ordered by this Court, pending his trial. If required he will give fresh bail to the satisfaction of the District Magistrate.

Criminal Revision No. 276 of 1931 is allowed and the order of the submission of the charge-sheets under S. 452/114, I. P. C. against Ramdhan Puri and Dhaneshwar Prasad is set aside and they are discharged from their bail. This will not prevent their prosecution for any other offence in connexion with dispute for which material may properly be placed before a competent Magistrate.

K.N./R.K.

Order accordingly.

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KULWANT SAHAY AND MOHAMMAD NOOR, JJ.

Tribeni Prasad Singh—Appellant.

v.

Ramasray Prasad Chaudhuri—Respondent.

Appeal No. 5 of 1928, Decided on 24th April 1931, against decision of Addl. Sub-Judge, Monghyr, D/- 29th August 1927.

(a) Civil P. C. (1908), S. 65—Sale of immovable property—Auction purchaser can pass subsisting right to his transferee even without having taken possession.

When a sale of immovable property has become absolute, the title of the auction-purchaser commences from the date of the sale, and the representative-in-interest of the auction-purchaser acquires a subsisting right in the property irrespective of whether the auction-purchaser has obtained delivery of possession; and merely that a part of the consideration paid by the representative-in-interest was dependent on the result of the suit for possession would not make the transaction bad, as opposed to public policy: 20 *I. C.* 325; 52 *I. C.* 353 and 35 *Cal.* 420 (*P. C.*), *Foll.* [P 83 C 1, 2]

(b) Civil P. C. (1908), S. 65—Title passes from date of sale and it can be established independent of sale certificate—Civil P. C., O. 21, R. 94.

Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time the sale becomes absolute. Further the sale certificate is merely an evidence of the title and does not create any title, and the title can be established independently of the sale certificate: 7 *C. L. J.* 384; 27 *Bom.* 379; 5 *All.* 395; 7 *Cal.* 199; 9 *Cal.* 842; 11 *Myl.* 296 and 1 *I. C.* 62, *Foll.* [P 83 C 2]

(c) Civil P. C., O. 34, R. 1—Omission to sue minor member of joint family does not vitiate sale under deed if family interest is properly looked after—Hindu Law, Alienation.

The omission to sue a minor member of a joint family, if the interest of the family was properly looked after in the suit, will not in any way affect the sale held in execution of the decree passed in the suit: 13 *Cal.* 21 (*P. C.*); 45 *I. C.* 76; *A. I. R.* 1911 *P. C.* 136 and *A. I. R.* 1930 *Pat.* 521, *Foll.* [P 85 C 1]

(After the Full Bench decision reported in *A. I. R.* 1931 *Pat.* 241 the matter was placed before the Division Bench for final disposal.)

Mohammad Noor, J.—This is an appeal against the decree of the additional Subordinate Judge of Monghyr decreeing the plaintiff-respondent's suit for possession of certain properties with mesne profits subsequent to the institution of the suit. The facts leading to the present appeal are these: Jagdip Narain Singh and Sant Prasad Singh who were members of a joint Hindu family mortgaged to Babu Gopi Lal 4 annas pucca share of village Mighaul, Tauzi No. 1079, and 2 annas 10 gandas pucca share equivalent to 10 annas kucha share in a 4 annas partitioned patti of village Matihani Gopal, Tauzi No. 1097, for Rs. 4,350, bearing compound interest at 12 per cent per annum with four-monthly rests under a registered

mortgage deed, dated 19th September 1890, corresponding to 20th Bhado II, 1297 Fs. The mortgage money was not paid and on 15th September 1903, Babu Gopi Lal instituted a mortgage Suit No. 407 of 1903, in the Court of the Subordinate Judge of Monghyr. In that suit the original mortgagors, Babu Jagdip Narain Singh and Babu Sant Prasad, were defendants first party, their sons and grandsons were defendants second party and one Babu Sakhichand and members of his family who had acquired a subsequent mortgage in one of the properties, namely, Mighaul, were defendants third party. The suit was decreed on 7th June 1904, and the decree was confirmed on appeal by the Calcutta High Court on 7th July 1905.

The final decree for sale was subsequently passed and Babu Gopi Lal, the decree-holder, took out execution; and the mortgaged properties were sold on 30th May 1914, for Rs. 40,966 and were purchased by the decree-holder. On that very day the decree-holder filed a petition before the Court stating that if the judgment-debtor does not file objection of any kind and does not put in any petition for setting aside the sale he would return the purchased properties on taking Rs. 20,000 only. This was however not to be. The judgment-debtors filed an application for the setting aside of the sale which was rejected on 22nd May 1915, and the sale was confirmed. There was an appeal to this Court which was dismissed on 3rd August 1917. The decree-holder auction-purchaser subsequently died and it is said that some quarrel arose in the family. Whatever may be the reason, nothing seems to have been done after the confirmation of the sale by this Court. The sale certificate was not taken out, the delivery of possession under O. 21, R. 95, was not applied for and a period of about 12 years expired since the date of the sale. On 22nd May 1926, the heirs and successors of Babu Gopi Lal, the original decree-holder auction-purchaser, conveyed to the plaintiff, Babu Ramasray Prasad Chaudhury, the entire share in the two aforesaid villages purchased by their ancestor at the execution sale above referred to. The conveyance was by three deeds of sale, Exs. 2, 2a and 2b. One deed was by one of the heirs for 6 annas share, a

second deed for another 6 annas share by some other heirs, and the third deed for the remaining 4 annas share by the rest of the heirs treating the property sold as 16 annas. On the basis of these conveyances the plaintiff instituted the present suit on 29th May 1926, seeking to recover the property and mesne profits since the suit, basing his title on the sale held on 30th May 1914. The sons and grandsons of the original mortgagors, Babu Jagdip Narain Singh and Sant Prasad, are the defendants first party; the representatives of Babu Sakhichand, who had acquired a subsequent mortgage in Mighaul, are the defendants second party, and the heirs and successors of Babu Gopi Lal, who are the vendors of the plaintiff, are the defendants third party. Various defences were taken before the lower Court. I shall later on deal with so much of the defence of the defendants first party as is relevant for this appeal when I come to the appeal itself. Suffice it to say that the learned Subordinate Judge has decreed the suit and the defendants first party have appealed.

At this stage I propose to dispose of the defence of the defendants second party, the heirs of Sakhichand, who had acquired a subsequent mortgage in one of the properties named Mighaul. I have already said that Babu Sakhichand himself, and members of his family, were defendants third party in the original mortgage suit in which the property was sold. The decree was passed in their presence. Since then they sued on their mortgage and obtained a decree. What happened of this decree is not known. Their defence in the present suit was that their mortgage, dated 11th September 1903, though subsequent to the mortgage of Gopi Lal, should have a priority over the latter, on the ground that their money was advanced for the satisfaction of another mortgage of Mighaul prior to the mortgage of Gopi Lal. An issue was raised on this point, and the learned Subordinate Judge after going into the facts has decided it against them. They have not appealed. It is therefore not necessary to deal with this part of the case any further.

Before I take up the question raised in the appeal itself I would like to dispose of a small matter which has been urged

on behalf of the appellants. It appears that the plaintiff after obtaining the decree in this suit executed it and obtained formal delivery of possession. When he applied to the revenue authorities for the mutation of his name it was found that in the meantime a third party had got his name recorded in the registers of the Land Registration Department on the basis of some transfer from the defendants first party. The revenue authorities refused to mutate the plaintiff-respondent's name and he has brought a separate suit against the defendants first party and their transferee whose name is entered in the records of the Land Registration Department. On 2nd November 1928, the respondent put in an application in this Court bringing all these facts to the notice of the Court and requesting that as the appellant had no subsisting interest in the property in suit the appeal had become infructuous and should be dealt with as such.

At the hearing of the appeal the learned advocate for the respondent (plaintiff) has not pressed this application, but the appellant tried to take advantage of it and urged that as according to the admission of the respondent himself the defendants-appellants had no subsisting interest the suit itself was infructuous and ought to be dismissed on this ground, the conveyance by the defendants being before the Court. I am unable to accede to this contention. The plaintiff's case in the plaint was that he was resisted in taking possession of the property by the defendants first party. In this view the plaintiff has a good cause of action against them (appellants) and we must determine the matter between the parties as they are before us. Whether the decree which may be passed in this suit will be binding upon any other person who may have acquired any interest in the property from the appellant is a matter which does not concern us. In their written statement the defendants first party never asserted that they are not connected with the property in dispute. They allowed the case to proceed before the lower Court and have filed an appeal before this Court. The question should therefore be determined and we overrule the contention of the appellants.

I now come to the defence raised by the defendants first party, the represen-

tatives of the original mortgagors. I will only deal with such of them as have been pressed before us in the appeal. The learned advocate for the appellants Mr. Abani Bhushan Mukharji has raised the following points: (1) that the plaintiff purchased merely the right to sue and not an existing right in immovable property, and therefore the sale to him by the heirs of Gopi Lal is invalid; (2) that no sale certificate having been obtained, there is no evidence of title to the properties sold; and the other evidence which is available is not admissible in evidence. The sale can only be proved by the sale certificate itself and no decree for possession can be passed in its absence; (3) that the sale is not binding upon defendants 7 and 8 of the first party, namely, Babu Jharkhandi Prasad Singh and Babu Jadunandan Prasad Singh, who were not parties to the original mortgage Suit No. 407 of 1903; (4) that the suit is barred by limitation governed by Art. 178, Limitation Act; (5) that the suit is barred by S. 47, Civil P. C.

As to the first point there is no force in the contention. S. 65, Civil P. C., is explicit and says that when a sale of an immovable property has become absolute the title of the auction-purchaser shall commence from the date of the sale. In this case the sale became absolute and the order of the Court making the sale absolute was confirmed by this Court. By the sale a right in the property sold was acquired by Babu Gopi Lal, the decree-holder auction-purchaser, and the plaintiff as the representative-in-interest of Gopi Lal, acquired a subsisting right in the property. A plea was taken before the lower Court that under the terms of the sale deeds (Exs. 2, 2a and 2b) the plaintiffs had not acquired any right as they had not paid the consideration money to their vendors, the heirs of Babu Gopi Lal. This is however a matter between the plaintiff and the defendants third party. In their written statements the defendants third party explicitly stated that title had passed to the plaintiff. The question of payment and nonpayment of the consideration money is a matter between them inter se, and in my opinion it cannot be raised by the defendants first party. The learned lower Court has relied upon *Nilmadhab Parhi v. Hara Prashad Parhi* (1)

(1) [1913] 20 I. C. 325.

and *Jagdip Sahay v. Sonu Lal* (2) for the authority that the execution of a sale deed passes title to the vendee unless there is a contract to the contrary between the parties. I agree with the findings of the learned lower Court and hold this point against the appellants. These sale deeds are not of a nature which can be held to be invalid on the ground of public policy as speculative transfers by way of gambling in litigation. No doubt a part of the consideration is dependent upon the result of the suit but this does not to my mind make the transaction bad as opposed to public policy. This was the view taken by the Judicial Committee of the Privy Council in *Bhagwat Dayal Singh v. Debi Dayal Sahu* (3). The property has been sold for its full value and the consideration dependent upon the result of the suit is only about a third of it. The transaction is not a gamble and not invalid. The right sold was the vendor's interest in the property acquired by the sale in execution and not a mere right to sue.

As to the second point raised by the learned advocate it is again enough to refer to the provisions of S. 65, Civil P. C. It says that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. It is clear that the title of the auction-purchaser is derived from the sale and not from the sale certificate. It accrues on the sale becoming absolute but takes effect from the date of sale itself. The sale certificate is merely evidence of title of the auction-purchaser and not the title-deed in the sense that the title is conveyed or created by it. The word "sale-certificate" itself denotes that it is only a certificate by the Court that the auction-purchaser has purchased the property.

No provision of law has been placed before us to show that the title of the auction-purchaser is derived from the sale-certificate. The learned advocate has relied upon *Vishnu Shanker Joshi v. Yusuf Nur Mahomad* (4). The

(2) [1919] 52 I. C. 363.

(3) [1908] 35 Cal. 420=35 I. A. 48=12 C.W.N. 393=7 C. L. J. 335 (P. C.).

(4) A. I. R. 1925 Bom. 483=88 I. C. 962.

case does not appear to be in point. There the dispute was as regards two sales held by two different Courts. One of them was not confirmed at all. The main question to be decided was which of these two sales was to prevail and the learned Judges, if I may say so, rightly held that one of the sales not having been confirmed could not prevail. No doubt they did refer to the sale certificate also, but, the sale not having been confirmed the question of sale-certificate was immaterial. On the other hand the learned advocate for the respondent has referred us to the case of *Tantadhari Singh v. Sundar Lal Missir* (5) where Mookerjee, J., observed as follows:

"It is settled law that when a person has purchased immovable property at an execution sale, he can establish his title by evidence independent of the sale certificate We agree in this view of the law, and hold that the Subordinate Judge ought not to have decided against the plaintiffs upon the question of title, merely because they had failed to produce their sale certificate."

Mookerjee, J., in dealing with the effect of nonproduction of the sale-certificate, referred to the observation of Chandravarkar, J., in *Narayan Bhagwan Gandhi v. Shamrao Laxuman* (6) and a decision of a Full Bench of the Allahabad High Court in *Jagan Nath v. Baldeo* (7) and also to the earlier decisions of the Calcutta High Court in *Doorga Narain Sen v. Beney Madhab Mazoomdar* (8) and *Tara Prasad Maytee v. Nund Kishore Giri* (9) and that of the Madras High Court in *Velan v. Kumarasami* (10). It is enough if I consider the Full Bench decision of the Allahabad High Court above referred to. In that case it was held that it was not incumbent on a purchaser at an execution sale, which had been duly confirmed, to produce his sale certificate, but it was competent for him to prove his purchase aliunde. The confirmation of the sale in his favour was prima facie evidence of his title to the property, and was sufficient to pass such title to him, of which a certificate if afterwards obtained by him would merely be evidence that the property had so passed. The

question was again considered by the Calcutta High Court in the case of *Braja Nath Pal v. Joggeswar Bagchi* (11), where Mookerjee, J., referring to the case of *Tantadhari Singh v. Sundar Lal Missir* (5), observed that the purchaser of immovable property at an auction sale can establish his title by evidence independent of the sale-certificate, as a sale-certificate does not create title, but is merely evidence of title. The law on this point is so settled that I do not propose to discuss it at great length. The learned advocate for the appellant referred us to S. 91, Evidence Act, and contended that as O. 21, R. 94, Civil P. C., makes it incumbent upon the Court to grant a sale certificate to the auction-purchaser, no other evidence to prove the sale and the property sold is admissible. I am unable to agree with this. S. 91, Evidence Act, prescribes that

" in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained."

In this case there is no matter which is required by law to be reduced in the form of a document. The sale is held under the order of the Court and there are records of these orders in the order sheet which has been produced. On these grounds I hold this point against the appellants.

The third point refers to the effect of the decree and the sale against defendants 7 and 8, Babu Jharkhandi Prasad Singh and Babu Jadunandan Prasad Singh. They are the sons of one of the original mortgagors, Babu Sant Prasad Singh. The plaint and the decree in the mortgage suit shows that one of the minor sons of Babu Sant Prasad Singh was named therein as Panchu Singh. The plaintiff's contention is that Panchu was another name of defendant 7, Jharkhandi Prasad Singh. This is supported by the judgment and the decree of the High Court of Calcutta in the mortgage suit (Exs. 11 and 15). The learned lower Court has held it as a fact that Panchu was another name of Jharkhandi Prasad who was party to the suit and described therein as son of Babu Sant Prasad. It has not been shown that Babu Sant Prasad

(5) [1907] 7 C. L. J. 384.

(6) [1903] 27 Bom. 379=5 Bom. L. R. 233.

(7) [1883] 5 All. 305 = (1883) A. W. N. 48 (F. B.).

(8) [1881] 7 Cal. 199.

(9) [1883] 9 Cal. 842=12 C. L. R. 448.

(10) [1887] 11 Mad. 296.

(11) [1909] 1 I. C. 62.

had another son named Panchu. I therefore agree with the finding of the learned lower Court that Jharkhandi Singh is an alias of Panchu Singh who was a party to the original mortgage suit. There is no doubt that Babu Jadunandan Prasad Singh was not a party to the mortgage suit. The case of the plaintiff in this respect is that he was not born at the time of the institution of the suit. I do not think so. It appears that one Ambica Prasad Singh, brother of Babu Jadunandan Prasad Singh, was a party to the suit and it is asserted on behalf of the appellant and is not strenuously disputed by the plaintiffs that Ambica who was a party to the original mortgage suit was a younger brother of Babu Jadunandan Prasad Singh. If he was born at the time of the institution of the suit Babu Jadunandan Prasad Singh, who was older, must have been born before the institution of the suit.

There is no doubt that he was left out from the original suit, but this will not in any way help the appellant. The omission to sue a minor member of a joint family, if the interest of the family was properly looked after in the suit, will not in any way affect the sale held in execution of the decrees passed in the suit: vide *Nanomi Babuasin v. Modhun Mohun* (12) and *Jagdish Narayan Prashad Singh v. Manmatha Nath Dey* (13), relied upon by the learned lower Court: see also *Sheo Shanker Ram v. Jaddo Kunwar* (14) and *Raghunandan Prasad Singh v. Ghananand Singh* (15). The plaint in the mortgage suit shows that Babu Jagdip Narayan Singh and Babu Sant Prasad Singh, the mortgagors, were sued as kartas and managers of the joint Hindu family and there are large number of cases of this Court showing that when a suit is brought against a karta of a joint Hindu family in his representative capacity, the suit will not fail for non-joinder of other members of the family. The defendant does not impugn the debt or the mortgage and the utmost that he can claim is that he has still the equity of redemption subsisting in him. The amount that he will now have to pay in

order to redeem will far exceed the value of the properties, and his learned advocate did not express his readiness to avail himself of this right when it was pointed out to him that this was all he could get. On these grounds I would decide this point also against the appellants.

Before I come to the question of limitation and the applicability of S. 47, Civil P. C., I would like to dispose of, in passing, one other defence of the appellants raised before the lower Court which, though referred to by the learned advocate, has not been seriously pressed. In para. 8 of the written statement of defendant 1 it is stated that, according to the terms of the petition filed by Babu Gopi Lal on 30th May 1914, the sum of Rs. 20,000 was paid to him and he gave up his right under the sale and did not, therefore take out the sale certificate or delivery of possession. I have referred to this petition of 30th May 1914. It was to the effect that if the judgment-debtors did not put in petition for setting aside the sale, and did not raise any objection to it, the decree-holder auction-purchaser would return the property to them on payment of Rs. 20,000, only. The learned lower Court has disbelieved the payment of Rs. 20,000, by the defendant first party, and I have no hesitation in accepting this finding. First of all the offer was conditional to the judgment-debtors not raising any objection to the sale. In fact objections were raised, application for setting aside the sale was filed and it was fought up to this Court. It is unbelievable that after fighting to the bitter end the decree-holder auction-purchaser would have given up the property so easily on receipt of Rs. 20,000, only. Then it is further unreasonable to believe that the judgment-debtor actually paid Rs. 20,000, to the decree-holder auction-purchaser and took no document from him or did not insist on the filing of some sort of petition before the Court. This point, though urged by Mr. Abani Bhushan Mukharji, has not, as I said, been strenuously pressed by him, and I see no force in it, and therefore decide this point also against the appellants.

I now come to the most important point in the case, namely, the question of limitation and the applicability of S. 47, Civil P. C. The importance of the applicability of S. 47, Civil P. C., is only in so far as it effects the question of limi-

(12) [1885] 13 Cal. 21=13 I. A. 1=4 Sar. 682 (P.C.)

(13) [1918] 45 I. C. 76.

(14) A. I. R. 1914 P. C. 136=24 I. C. 504=41 I. A. 216=36 All. 383 (P.C.).

(15) A. I. R. 1930 Pat. 521=126 I. C. 377.

tation. Under the present Code the question whether a particular relief can be obtained by an application under S. 47, Civil P. C., or by a separate suit is, unless the question of limitation comes in, of academic interest only. Now the Courts are empowered to treat a petition under S. 47, Civil P. C., as a plaint and vice versa. Therefore had this suit been brought within three years of the date of purchase, the question would have been of no practical importance. But it has been instituted long after the expiry of three years and just before the expiry of 12 years. The question is, whether the decree-holder auction-purchaser can bring a suit for recovery of possession of the property purchased at an auction sale within 12 years of the sale as provided in Art. 138, Lim. Act, or his only remedy is by an application for delivery of possession to the executing Court for which the period of limitation prescribed is three years only? There was divergence of judicial pronouncements on this question.

We were referred to the Full Bench decision of this Court in the case of *Abdul Gani v. Raja Ram* (16). There it was held that an application for delivery of possession under O. 21, R. 95, Civil P. C., does not relate to the execution, discharge or satisfaction of the decree and therefore an order under that section was not appealable. It practically held that S. 47, Civil P. C., does not apply to an application for delivery of possession. That decision was based on the *curius* of the Calcutta High Court. Since then the Calcutta High Court in the case of *Kailash Chandra Tarafdar v. Gopal Chandra Poddar* (17) has held that the decree-holder auction-purchaser applying for possession under O. 21, R. 95, comes within the provision of S. 47, Civil P. C., as it was a question between the parties to the suit and was a proceeding relating to the execution, discharge or satisfaction of the decree. It is obvious that if the delivery of possession to the decree-holder auction purchaser comes within the purview of S. 47, Civil P. C., a separate suit will be barred and the only remedy of the decree-holder will be by way of an application for which as I have said the period of limitation is

three years. We felt some doubt as to the correctness of the decision of the Full Bench of this Court in *Haji Abdul Gani v. Raja Ram* (16) and with the consent of the Hon'ble the Chief Justice by our order, dated 5th December 1930, we referred under Rr. 1 and 6, Ch. 5 of the Rules of this Court the following question of law for decision by a specially constituted Bench :

"Whether a suit instituted by the decree-holder auction-purchaser or his representative-in-interest for recovery of possession of the property purchased in execution of the decree is barred by the provisions of S. 47, Civil P. C., or, in other words, whether a decree-holder who becomes a purchaser of the property sold in execution of his own decree ceases as such to be the party to the suit, and whether the question relating to delivery of possession of the property purchased by the decree-holder auction-purchaser is a question relating to the execution, discharge or satisfaction of the decree."

The reference was heard by a Bench of this Court consisting of Sir Courtney-Terrell, C. J., Sir Jwala Prasad, Ross, Wort and Kulwant Sahay, JJ. Their judgment was delivered on 21st April 1931, and the question of law referred by us was answered in the negative. It has been held that the suit instituted by decree-holder auction-purchaser or his representative-in-interest for recovery of possession of the property purchased in execution of the decree is not barred by the provisions of S. 47, Civil P. C. It follows that the suit is maintainable and the period of limitation is 12 years under Art. 138, Lim. Act. The suit is therefore not barred either by the provisions of S. 47, Civil P. C., or by Art. 138, Lim. Act.

The result is that the appeal is dismissed with costs.

Kulwant Sahay, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 86

MACPHERSON AND MOHAMMAD
NOOR, JJ.

Tej Narayan Singh and others—Petitioners.

v.

Secy. of State—Respondent.

First Appeal No. 83 of 1925, Decided on 10th March 1931.

(a) **Court-fees Act (1870), S. 15**—Scope—Requirements are admission of application

(16) [1916] 1 Pat. L.J. 232=35 I.C. 463 (F.B.).

(17) A.I.R. 1926 Cal. 798=95 I.C. 494=53 Cal. 781 (F.B.).

for review and modification of order on certain grounds.

The requirements of S. 15 are : (1) the admission of the application for review of judgment irrespective of the correctness of the grounds for the admission ; (2) a reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing. [P 88 C 1]

(b) **Court-fees Act (1870), S. 15—Applicant absent at original hearing—Review admitted, judgment modified in favour of applicant—Applicant is entitled to certificate and delay of six months is immaterial.**

Where a review is admitted on the ground of the mistake in fact and the previous decision is modified, although the applicant may not have appeared at the original hearing he is entitled to a certificate under S. 15 if, as a result of the admission of the review, the former decision is modified substantially in favour of the applicant and further a delay of six months from the date when the application might first have been made is no bar to the granting of such certificate : *A. I. R. 1930 Pat. 495, Dist.* [P 88 C 2]

B. P. Sinha—for Petitioners.

S. Dayal, Govt. Pleader — for the Crown.

Judgment.—This is an application under S. 15, Court-fees Act, for a certificate authorizing the petitioners to receive back from the Collector the sum of Rs. 577-8-0 paid as court-fee on an application for review of an appellate judgment in this Court less a sum of Rs. 3 which would be the fee payable on an ordinary application to this Court under Sch. 2, Court-fees Act.

The circumstances are as follows : Basarh and Zorowarganj are contiguous villages in the Kosi area of Bhagalpur. The north-east portion of Basarh and some adjoining villages became dahanal on account of the Kosi floods and remained so for many years and finally became fit for cultivation in 1316 F. The proprietors of Basarh sued for recovery of possession of certain lands as being part of Basarh with mesne profits and made the applicants defendants first party. The petitioners are tenure-holders of eight annas of Zorowarganj. The defendant second party, the proprietor of the Darbhanga Raj, is the proprietor of Zorowarganj and holds eight-annas khas. The third party defendants are the raiyats holding the disputed land.

The suit was decreed by the trial Court with mesne profits from 1326 F. till recovery of possession and the extent of mesne profits was left to be ascertained later.

The defendant second party appealed making the plaintiffs and his co-defendants respondents to his appeal. At the hearing the defendants respondents did not appear. The appellant abandoned his claim to the lands and only contested the decree so far as it granted mesne profits. This Court held that the appellant was protected from liability to mesne profits by virtue of an agreement between him and the plaintiffs that, upon demarcation according to the revenue survey and recovery of possession up to the boundary so demarcated, no mesne profits should be payable by either party. This Court decreed the appeal and specifically directed that the appellate order should not affect in any way the decree which the learned Subordinate Judge had passed as against the defendants other than the defendant-appellant.

The petitioners then filed an application for review and were made to pay court-fee in accordance with the valuation of the appeal, their protest that they should pay only upon the valuation of the mesne profits being rejected. Das, J., allowed the review on the ground of an error apparent on the face of the record.

The appeal came on for rehearing before a different Bench which dismissed it in toto holding that the agreement was not relevant since dispossession took place subsequent to it.

The applicants for review now apply under S. 15, Court-fees Act, for refund of court-fee paid on the application.

The office of the Court doubted whether S. 15 was available to the applicants on the view that the adverse order first passed against them in the appeal was due to their own laches in not appearing and presenting their case at the original hearing and considered that the principle underlying the proviso to S. 15 should be applied in this case. The office also referred to the decision in *Jadubansi Sahay v. Barhamdeo Narayan Singh* (1) in connexion with the delay in applying for refund.

Section 15 reads as follows:

"Where an application for review of judgment is admitted, and where, on the rehearing the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee payable on

(1) *A. I. R. 1930 Pat. 495=126 I. C. 294.*

any other application to such Court under the Sch. 2 to this Act No. 1, Cl. (b) or Cl. (d).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing."

The Government Pleader who was asked to appear contends, first, that in the circumstances of the case refund of court-fee is not available under S. 15. He urges that the application for review was admitted under the misapprehension of fact that the present petitioners had had no opportunity of being heard, and further that on the rehearing the former decision was not reversed or modified on the ground of mistake in law or in fact, but rather in view of fresh contentions which could have been raised if the applicants had only taken the trouble to appear and that in any case the modification was not in favour of the applicants. Mr. B. P. Sinha urges that so far as S. 15 is concerned, if an application for review has in fact been admitted, it is enough and the adequacy of the ground of admission is irrelevant, and further that at the rehearing the Court did substantially modify its former decision on the ground of mistake in law or in fact. In our opinion the contention on behalf of the applicants cannot be gainsaid. The requirements of S. 15 are perfectly definite: (1) the admission of the application for review of judgment irrespective of the correctness of the grounds for the admission; (2) a reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing. It cannot be contended that the application for review was not admitted. As to the result of the rehearing, the learned Government Pleader contends that so far as the applicants were concerned, there was no difference between the first and the second decisions since under both they only became liable for half of the mesne profits, the extent of their interest being set out in the plaint. But a perusal of the decision of the first Court and of the decisions in this Court does not appear to bear out the contention. In the judgment of the trial Court all the defendants are made liable both for the mesne profits and for the costs

of the suit. The first decision in appeal left the decree against the applicants intact. The result was that they were liable both for the whole of the mesne profits and of the costs. That view cannot be contested so far as the costs are concerned and the modification in respect of the costs being made on a ground of mistake in law or in fact would alone be sufficient to bring the application within S. 15. The learned Government Pleader would indeed contend that at the ascertainment of mesne profits the applicants would only be held responsible to the extent of their interest in the village or to the extent of the trespass actually made by them and accordingly the decision at the rehearing does not benefit them. This is however not by any means clear and on the whole one is inclined to think that an executing Court would regard the decree of the trial Court as making all the defendants responsible for the whole of the mesne profits so that the restoration at the rehearing of the appeal of the liability of the appellant was a modification to the benefit of the applicants who are co-judgment-debtors with him. It is not contended that the fresh arguments presented to the Court constituted "fresh evidence" within the meaning of the proviso to S. 15. In our view there has not only been at the rehearing a modification of the former decision, but it is one substantially in favour of the applicants, and it is made on the ground of a mistake of fact.

The point taken by the office as to delay in applying for refund is without substance. The decision cited is under S. 151, Civil P. C., and relates to a different matter in which it was discretionary with the Court to accord relief. Moreover the delay is only six months from the date when the application might first have been made and not 18 months as supposed by the office.

On this view S. 15 is available to the applicants and they are entitled to a certificate, and it is directed under S. 15 that they receive a certificate, from this Court authorizing them to receive back from the Collector the sum of Rupees 574-8-0.

V.B./R.R. *Application allowed.*

Advocate High Court

Jammu & Kashmir

A. I. R. 1932 Patna 89

WORT AND FAZL ALI, JJ.

Ramyad Mahton—Objector — Appellant.

v.

Ram Bhaju Mahton—Petitioner—Respondent.

Appeal No. 177 of 1929, Decided on 15th April 1931, against original decree of Dist. Judge, Patna, D/- 2nd September 1929.

Succession Act (1925), S. 283 — Citation should be served on all persons who have locus standi to be heard on question of grant of probate.

It is clear from S. 283 (1)(c) that what was intended by the legislature was that citations should be served upon all persons who have an interest in the estate, in other words, all persons who have a locus standi to be heard on the question of grant of probate.

Where an objector to the petition for granting the letters of administration claims that he was joint in property which the testator left by will, he has no locus standi to object to the granting of the letters of administration even where citations have been served on him: 39 I. C. 573, *Foll.*; 2 I. C. 402; A. I. R 1926 Mad. 1193 and 17 Cal. 48, *Ref.* [P 90 C 2]

C. C. Das and *B. C. Sinha*—for Appellant.

L. N. Singh and *Bindeshwari Prasad*—for Respondent.

Wort, J.—This appeal arises out of an application for letters of administration with the will annexed of one Puran Mahto.

The objector in the Court below contended that the will was not a genuine one, that it was not executed according to law, that it was a forgery, and that the testator had not testamentary capacity at the time; and as a fourth point he alleged that the objector was the own brother's son of the deceased, was living joint with him and had succeeded by survivorship to all the properties and is in possession of them.

The possession of the person in whose favour the will was made is beyond dispute. The case which was raised by the objector at any rate so far as this Court is concerned was that the will had not been proved to have been executed in accordance with law. It is true that Mr. C. C. Das on behalf of the objector-appellant contended that there were suspicious circumstances surrounding the execution of the will more particularly regarding the provisions of the will. But the case which was made or attempted to be made in the Court below, that is to say, that

the will was not genuine and a forgery was abandoned by him in this Court. His main contention therefore was that the will was not made in accordance with law.

Section 63, Succession Act, provides:

“(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator.”

In this case there is no dispute that the testator was an illiterate person, and it is contended in the first place by Mr. C. C. Das that the evidence which was offered by the person propounding the will did not satisfy the law as provided in the section which I have just read.

For reasons which will presently appear, I do not propose to go into the details of that evidence; it is sufficient for me to say that the learned District Judge was satisfied with the evidence that was adduced before him. He seems to have been influenced by the fact that the will had been registered some three years before the death of the testator, and for this purpose he relied upon the decision of the Judicial Committee of the Privy Council in the case of *Gangamoyi Debi v. Troiluckhya Nath Chowdhury* (1). In that case the question was in regard to the execution of a will, and Sir Ford North, in delivering the opinion of the Judicial Committee of the Privy Council, made this statement:

“But they desire to put the case on a higher ground. The registration is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature, will be presumed to be done duly and in order.”

And upon that statement Mr. Rowland, the District Judge, acted in coming to the conclusion that the proof adduced before him was sufficient to satisfy the conscience of the Court of Probate.

(1) [1906] 33 Cal. 537=33 I. A. 60=3 C. L. J. 349 (P. C.).

Mr. Das however raises a further question which does not seem to me to have been suggested in the Court below and that was that in this case of an illiterate person not only was the onus upon the propounder of the will to show that it had been executed in accordance with law, but that it was necessary to show that the will had been read over to the testator before it was executed, so that the Court could be satisfied that the testator understood the contents of the will. But for the reason which I stated a moment ago I do not intend to go into the question of whether the evidence was sufficient or not to prove the execution of the will in accordance with law, and for that reason I do not propose to go into this question which is one of some difficulty and depends to some extent at any rate upon a number of English authorities although there are a number of cases in the Indian High Courts bearing on the same question.

One matter that was raised before Mr. Rowland, the learned District Judge, was that the objector had no locus standi, but he does not appear to have decided the merits of that point, because he said that the objector had come before him and therefore he must be heard.

I have read already para. 4 of the objector's petition which was to the effect that the testator and the objector were living joint and therefore the property which the testator purported to dispose of was joint family property.

Section 283, Succession Act, provides that:

"The District Judge shall, if he thinks proper to issue citations, call upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration."

The case of *Kalajit Singh v. Parmeshwar Singh* (2) was decided precisely on similar facts, that the petitioner claiming as he did that he was joint with the testator was not a person who had an interest in the estate of the deceased. It is true that in that case the petitioner was applying for the revocation of the probate. In this case, as Mr. Rowland has pointed out, citations had been served upon the objector and that he had appeared before the Court, and on that ground Mr. C. C. Das attempts to differentiate the case of *Kalajit Singh v. Parmeshwar Singh* (2) from the case

which is now before us. But it is difficult to support that contention because it seems to me quite clear from S. 283, Cl. (c), sub-S. (1), that what was intended by the legislature was that citations should be served upon all persons who have an interest in the estate; in other words, all persons who have a locus standi to be heard on the question of the grant of probate. But even assuming that that difference can be supported, it seems to me that when once the learned Probate Judge has pronounced for the will, the objector comes before this Court on appeal the petition is in substance a petition to have the grant revoked. Before the case of *Kalajit Singh v. Parmeshwar Singh* (2) was decided there was a case in the Calcutta High Court, the case of *Abhiram Dass v. Gopal Das* (3), in which the caveator claimed the property which the testator purported to leave as the property of the mutt; and it was held there that the objector had no interest in the estate of the deceased and therefore had no locus standi. A similar decision was arrived at in the case of *Srigobind Pershad v. Mt. Laljhari* (4). There it was claimed that the property with which the testatrix purported to deal was the property of the testatrix and it was contended by the principal objector who was a member of the joint family amongst other things that the testatrix had no right to deal with it; he also raised the point that the will was not a genuine one. In that case on the basis of that objection the Calcutta High Court held that the objector had no locus standi. The judgment in the case of *Kalajit Singh v. Parmeshwar Singh* (2) was not a reasoned judgment nor does it appear to be a judgment based on any authority, but the principle which it laid down is binding upon us and has been applied in other cases as I have shown. In the case of *J. Hanmantha Rao v. A. Latchamma*, A. I. R. 1926 Mad. 1193, there is a decision questioning this view and in it the cases of the Calcutta High Court have been discussed.

For these reasons, in my judgment, the objector in this case had no locus standi with the result that this appeal must be dismissed with costs.

Fazl Ali, J.—I agree that the appeal should be dismissed with costs parti-

(3) [1889] 17 Cal. 48.

(4) [1909] 2 I. C. 402.

(2) [1917] 39 I. C. 573.

cularly as I am satisfied that the will has been proved.

B.V./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 91

WORT, J.

Mohammad Haroon—Defendant — Appellant.

v.

Asghar Husain — Plaintiff — Respondent.

Appeal No. 586 of 1929, Decided on 1st May 1931, from decision of Sub-Judge, Saran, D/- 17th December 1928.

(a) Malicious Prosecution — In action for malicious prosecution both absence of reasonable and probable cause and malice must be proved.

In an action for malicious prosecution what the plaintiff has to prove, is, first that the prosecution was started by the defendant without reasonable and probable cause, and, secondly, that the prosecution was malicious. It is to be noted that although it is found that there was no reasonable and probable cause, yet an action for malicious prosecution will not lie unless malice is also proved, and also the converse must be noticed that if in fact there was reasonable and probable cause however improper the motive of the prosecutor may have been, no action will lie for malicious prosecution; in other words, two things have to be established and they cannot be divorced. One that there was no reasonable and probable cause, and the other that the prosecution was started maliciously: *A. I. R. 1926 P. C. 46, Expt.* [P 92 C 1, 2]

(b) Malicious Prosecution—Plaintiff has to prove not only that proceedings complained of terminated in his favour, but also absence of reasonable and probable cause — It is not necessary for him to prove his innocence—Burden of proof of absence of reasonable cause is always on plaintiff and not on defendant.

In an action for malicious prosecution it is not necessary for the plaintiff to prove his innocence upon the charge on which he was tried, but the plaintiff has to prove that with regard to the proceedings complained of they terminated in his favour. The burden of proof is always on the plaintiff and not on the defendant to prove it. In such cases the Judge should address his mind to the point whether the evidence of the plaintiff establishes want of reasonable and probable cause. Though the onus is always on the plaintiff, that does not prevent the Judge from considering the evidence of the defendant as well as that of the plaintiff, but no failure on the part of the defendant can possibly help the plaintiff in an action of this kind. The plaintiff cannot be deemed to discharge his part of the onus by proving his acquittal. Merely the proof of such acquittal cannot be the prima facie evidence of want of reasonable and probable cause. To say that there was want of reasonable and probable cause, is a matter of great delicacy, and it must be remembered that the matter is to be judged in the light of what the defendant thought the facts to be and not in the light of what the facts in fact were. On the question of reasonable and

probable cause, the Judge is to determine that on the evidence in the case before him and not on the evidence in the criminal Court: *A. I. R. 1926 P. C. 46, Ref.* [P 92 C 2; P 93 C 1]

(c) Malicious Prosecution—Damages—Court can deduct compensation given by criminal Court while awarding damages in civil suit.

In an action for damages for malicious prosecution the civil Court can deduct from the damages it awards to the plaintiff, the amount of compensation awarded to the plaintiff accused by the criminal Court. [P 91 C 2]

(d) Civil P. C. (1908), S. 100 — Malicious Prosecution — Questions of malice and of reasonable and probable cause are questions of law—Facts from which these are proved are questions of fact—Malicious Prosecution.

Both the questions of reasonable and probable cause and the question of malice are questions of law; in other words, to put them in the language of the English Bench and Bar, the question of reasonable and probable cause and the question of malice are questions for the Judge. The facts from which an inference of want of reasonable and probable cause or an inference of malice are to be drawn must be found by the jury; in other words they are questions of fact. [P 92 C 2]

J. Chatterji and Ram Prasad—for Appellant.

L. N. Singh and Hareshwar Prasad Sinha—for Respondent.

Judgment.—This is an appeal from the decision of the learned Subordinate Judge of Saran, who reversed the decision of the Munsif in an action for malicious prosecution. The plaintiff in the trial Court failed, but on appeal to the learned Subordinate Judge, as I have indicated, a decree was given in favour of the plaintiff for Rs. 326-8-0 less Rs. 75 as damages; the Rs. 75 was the amount of compensation which the Magistrate in a criminal case awarded the plaintiff, the accused, as compensation.

One of the points made here is that the learned Subordinate Judge was not entitled to deduct that Rs. 75. Undoubtedly he was. The plaintiff received compensation from one Court and it might be said, and in fact must be said, that he was not entitled to recover compensation twice over for the same cause of action, although by this statement I must not be understood to suggest that the plaintiff was not entitled to recover damages before the civil Court. He made out his case and in regard to the Rs. 75 which was deducted it must be remembered that the criminal Court was not intending to award the accused full compensation for the trouble he had gone through but some measure of compensation only.

It is contended by Mr. Jyotirmoy Chatterji, on behalf of the defendant, who

was the prosecutor in the criminal case, that the learned Judge has misdirected himself as regards the law. In the first place it is stated that his finding on the question of whether there was reasonable and probable cause is based merely on the fact that there was an acquittal by a Court of competent jurisdiction and therefore it is said that the learned Judge has come to the conclusion that there was prima facie evidence of want of probable cause; and having stated that, the learned Judge proceeds to enter into an inquiry as to what the defendant's version in the case was. Another point in which the learned Judge has misdirected himself is that he has stated that in a case of this kind it is necessary for the plaintiff to prove his innocence. This does not materially affect the defendant-appellant before me because by this statement of the law the learned Subordinate Judge has placed the onus on the plaintiff much greater than the law admits. The learned Judge appears to have relied on a case in this High Court to support that statement, that it is necessary for the plaintiff to prove his innocence. Undoubtedly that is wrong, and in this connexion it is necessary for me to support my statement by reference to English authorities. In the case of *Balbhaddar Singh v. Budri Sah* (1) Lord Dunedin, in delivering the opinion of the Judicial Committee of the Privy Council, refers to the statement of the law by the learned Judicial Commissioner of Oudh in which the learned Judicial Commissioner appears to have stated that it was necessary for the plaintiff to prove his innocence upon the charge on which he was tried. Lord Dunedin points out how this mistake may have occurred by reason of the old forms of pleading in England, and he goes on to state that the correct view is that the plaintiff has to prove that with regard to the proceedings complained of they terminated in his favour. But it is hardly a material point in this case in any event.

Now what the plaintiff has undoubtedly to prove, apart from the point which I have just referred to, is, first, that the prosecution was started by the defendant without reasonable and probable cause, and, secondly, that the prosecution was malicious. It is to be noted that although it is found that there was no reasonable

and probable cause, yet an action for malicious prosecution will not lie unless malice is also proved, and also the converse must be noticed that if in fact there was reasonable and probable cause however improper the motive of the prosecutor may have been, no action will lie for malicious prosecution; in other words two things have to be established and they cannot be divorced. One that there was no reasonable and probable cause, and, as I have already said the prosecution was started maliciously.

The main point upon which Mr. Chatterji has argued his appeal is, apart from the alleged misdirections of law, the fact that in substance the learned Subordinate Judge has placed the onus on the defendant and not on the plaintiff.

Before I come to that, I should state that both the question of reasonable and probable cause and the question of malice are questions of law; in other words, to put them in the language of the English Bench and Bar, the question of reasonable and probable cause and the question of malice are questions for the Judge. But it must be remembered that the facts from which an inference of want of reasonable and probable cause or an inference of malice are to be drawn must be found by the jury; in other words they are questions of fact.

Now keeping those propositions clearly before one's mind, we should see whether the learned Subordinate Judge has misdirected himself or not. The learned Judge has stated, and I have already referred to the matter, that the plaintiff was acquitted in the criminal case started by the defendant against him, and I have to see whether the defendant's version is correct. That undoubtedly is wrong in law. The onus is always on the plaintiff and it is for him to establish it in this case.

A number of witnesses were called. What they proved I do not know; but what the learned Judge had to address his mind to was whether the evidence of the plaintiff established want of reasonable and probable cause. It is true, as I have already stated, that the onus is always on the plaintiff, but that does not prevent the learned Judge from considering the evidence of the defendant as well as that of the plaintiff, but no failure on the part of the defendant can possibly help the plaintiff in an action of this kind.

(1) A. I. R. 1926 P. C. 46=95 I. C. 329=29 O. C. 163=1 Luck. 215 (P. C.).

The learned Judge was undoubtedly wrong, in my opinion, when he satisfied himself that the plaintiff had discharged his part of the onus by coming to the conclusion that the acquittal was prima facie evidence of want of reasonable and probable cause. To repeat myself, it was necessary for him to go through the evidence and then if he came to the finding at which he appears to have arrived in this case, namely, that the case of the prosecution under S. 506 was false, that as a matter of law would entitle him to say that there was want of reasonable and probable cause. But it is a matter of great delicacy, and it must be remembered that the matter is to be judged in the light of what the defendant thought the facts to be and not in the light of what the facts in fact were.

On the question of malice the learned Judge appears to have come to the conclusion in this case that the prosecution was malicious by reason of the fact of want of reasonable and probable cause. In support for the learned Judge's decision on that point there is the case of *Brown v. Hawkes* (2). In that case on appeal Kay, L. J., in particular stated that it is sometimes said that the non-existence of reasonable and probable cause is some evidence on which the jury may infer malice and a similar observation was made by the other Lord Justices who formed the Court of appeal. And in the last edition of Roscoe's *Nisi Prius Evidence*, or, as it is now called, *Roscoe's Evidence in Civil Actions*, it is also stated that from the fact that the plaintiff proved want of reasonable and probable cause malice might be inferred. But the soundness of the learned Judge's view as regards that matter, in my opinion, appears to be vitiated by his method of dealing with the question of reasonable and probable cause. On the question of reasonable and probable cause, the learned Judge is to determine that on the evidence in the case before him and not on the evidence in the criminal Court.

To sum up, what the plaintiff has to prove in this case is, first, that he was acquitted and, secondly, that there was want of reasonable and probable cause. The facts upon which that question of law is to be determined are questions of fact. But the question itself of whether

there was reasonable and probable cause is a question of law; and, thirdly, the fact as to whether the prosecution was malicious or not upon which an inference is to be drawn is a question of fact. But the question of whether there was malice is a question of law.

A cross-objection is raised as regards the damages allowed; but I see no ground for interfering with the measure of damages which the learned Judge has applied.

In those circumstances the matter must go back to the learned Subordinate Judge to be heard and determined according to law.

The costs of this appeal will abide the hearing in the Court below.

B.V./R.K.

Appeal allowed.

A. I. R. 1932 Patna 93

SCROOPE, J.

Kharra Majhi—Plaintiff—Appellant.

v.

Abinash Chandra Chakravartti—Defendant—Respondent.

Appeal No. 1106 of 1929, Decided on 4th May 1931, against appellate decree of Judicial Commissioner, Manbhum, D/- 23rd April 1929.

(a) **Chota Nagpur Tenancy Act (1908), S. 94—Claim of rent in excess of rent recorded in khatians cannot be enforced.**

Where the plaintiff claims rent in excess of the rent recorded in the khatians as payable for the occupancy holdings in possession of the defendants by splitting the said holdings and apportioning them to different members of the defendant's family, such claim cannot be enforced being in excess of the amount recorded in the Record of Right: *Second Appeal No. 622 of 1925, Diss. from.* [P 94 C 1, 2]

(b) **Chota Nagpur Tenancy Act (1908), Ss. 94 and 84—S. 94 overrides S. 84—Purpose of S. 94 explained.**

Section 94 of the Act overrides the provisions of S. 84. S. 94 applies to rents entered in the Record of Rights irrespective of the question whether there has been a settlement of rent or not; in fact irrespective of how the rental has been fixed. The provisions in S. 94 are designed to prevent parties who have not availed themselves of the opportunity provided by the Act for the revision of rents, from reopening the question in an ordinary rent suit and are based upon the special conditions of Chota Nagpur. [P 94 C 2]

A. B. Mukharji and *N. N. Banerji*—for Appellant.

Radha Shyam Chattarji—for Respondent.

Judgment.—The suit out of which this appeal arises is one of a batch of eight suits for recovery of rent and cesses for the years 1331 to 1334 in respect of holdings in Mauza Muldih. In the present suit

(2) [1891] 2 Q. B. D. 718=61 L. J. Q. B. 151=65 L. T. 108=55 J. P. 823.

No. 483 of the Munsif's Court, an annual rent of Rs. 24 exclusive of cess was claimed, but the case for the two tenant-defendants who are brothers was that they with the defendants in Suits Nos. 484, 485 and 487-89 jointly held two tenancies under the plaintiff bearing khata Nos. 5 and 6, the annual rent of the former being Rs. 4 and of the latter Rs. 10 plus cess of 7 and 5 annas respectively. They alleged that the plaintiff had wrongly sued them for rent by splitting up these two holdings into a number of different holdings and apportioning them amongst the different members of the family. The plaintiff produced in support of his case previous decrees; but the first Court held against him as the total amount of rent demanded in the different suits Nos. 483-485 and 487-489, was Rs. 63-10-0 which was much in excess of the rent recorded in the khatians for the two khata, and as S. 94, Chota Nagpur Tenancy Act, provides that no demand for rent in respect of an occupancy holding in excess of the amount entered in the Record of Rights shall be enforceable except in circumstances which admittedly do not apply here; the learned Munsif accordingly dismissed the suit out of which this appeal arises along with the suits the numbers of which I have given above because, as I say, the total rent claimed in them was in excess of the rent recorded in the khatians as payable for the two holdings in possession of the defendants.

On appeal to the Judicial Commissioner he held that S. 94 did not override S. 84 which only gives a presumptive value to the Record of Rights and that the presumption had been rebutted by the previous decrees. He therefore allowed the appeal of the landlord and decreed the suit for the amounts claimed. For the view he has taken of S. 94, Chota Nagpur Tenancy Act, he relies on an unreported decision of a single Judge of this Court: *Janardan Kishore Lal Singh Deo v. Kali Pada Tewari* (1), the relevant portion of which runs as follows:

"Section 94, after providing that when the rent of an occupancy holding has been entered in the Record of Rights the rent shall not be enhanced or reduced for the period therein stated except on specified grounds, enacts that 'no demand for rent in respect of an occupancy holding in excess of the amount entered in the said Record of Rights shall be enforceable save as provided in this chapter or in S. 32, etc. Now, that makes the Record of Rights the criterion of the rate of rent; but the authority of the Record of Rights itself is defined

in S. 84 in that chapter in this way; that 'every entry in a Record of Rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect.' This rate of rent in the Record of Rights can have no higher authority than the record itself. It is not irrebuttable, but may be rebutted by evidence. Where there are decrees of a civil Court it is clearly rebutted, because the matter is *res judicata* and it is not competent to the settlement officer to overrule the decision of the civil Court."

With very great respect I am entirely unable to agree with the view of the law taken here. The learned advocate for the respondent, in support of this interpretation, draws my attention to S. 113, (1), Ben. Ten. Act, but that section only provides the period for which rents settled under Ch. 10, Ben. Ten. Act, are to remain unaltered: whereas S. 94, Chota Nagpur Tenancy Act, applies to rents entered in the Record of Rights irrespective of the question whether there has been a settlement of rent or not; in fact irrespective of how the rental has been fixed. If the interpretation of the section be in accordance with that adopted in the decision cited above and relied on by the learned Judicial Commissioner then this provision in S. 94 becomes entirely meaningless as the learned Munsif has pointed out. In my opinion the view adopted by the learned Munsif was entirely correct. There is no hardship either in this interpretation; the landlord can ask for settlement of fair rent under S. 85; he can apply under S. 87, for correction of the entry; he can also apply to the revenue officer for revision under S. 89. This provision in S. 94 is designed to prevent parties, who have not availed themselves of the opportunity provided by the Act for revision of rents from reopening the question in an ordinary rent suit and is based upon the special conditions of Chota Nagpur. There is another reason also why the suit must fail; it has not been shown by the plaintiff that the previous decrees (Exs. 6 and 6-a) related to the lands now in suit. The land subject of the previous decree (Ex. 6) which is dated 20th October 1911, is described as follows:

"SCHEDULE OF LAND:

- One plot below Majhi bundh:—
- East*—Plaintiff's khas danga (high land).
- West*—Border of *ar* (embankment) of Majhi bundh in the khas possession of the plaintiff.
- North*—Border of the bari in the khas possession of the plaintiff.
- South*—Border of land below Majhi bundh in the khas possession of the plaintiff."

In Ex. 6-a the decree, dated 17th December 1923, the description is simply, "one plot below Majhi bundh" (sic). In this area a Record of Rights had been finally published—the exact date of final publication does not appear—but evidently it was after 1923 and before the institution of the present suit.

In the present set of rent suits which plaintiff filed in 1928 he gave no description of the land at all as he was required to do by S. 144, Chota Nagpur Tenancy Act, which further requires that where a Record of Rights has been finally published the plaint shall contain a list of the survey plots comprising the tenancy, a statement of the rent of the tenancy according to the Record of Rights and a copy of entries in the Record of Rights regarding the subject-matter of the suit; later on however, he amended his plaint and supplied for the rent suit out of which this appeal arises plot Nos. 231-242; he thus complied with the first requisite of S. 144, but not with the other two; but above all he made no attempt to prove that the plot numbers specified corresponded with the land covered by the previous decree and it was incumbent on him to do this as defendants had taken objection regarding the specification of the holdings in their written statement. What the plaintiff has done is, in order to effect a nominal compliance with S. 144, to take a certain number of plots out of the defendants' joint khata and distribute them at random over the different suits; for no attempt at all has been made to prove any identity; this is the second reason for which the suit must fail; and the third reason is that a statement of rent of the tenancy according to the Record of Rights has not been supplied.

It was argued for the respondents that this appeal was barred by res judicata and the contention seems to be this: in the other seven suits the appeal lay to the Deputy Commissioner who decreed them all following the unreported judgment referred to above; but the present appeal lay to the Judicial Commissioner as the amount sued exceeded Rs. 100. The argument is that the question whether the plaintiffs are entitled to realize rent on the basis of their previous decree or according to the Record of Rights has been finally decided by the Deputy Commissioner in favour of the plaintiffs in those appeals and is therefore res judicata

now. There is no substance in this. The holding in the present suit is quite a different holding according to the plaintiff's case from the holdings in the other suits and in each one of those suits different holdings are involved; and the plaintiffs' plea was supported by different decrees in each case; so obviously no question of res judicata arises, the subject-matter of dispute being different in each case.

For these reasons this appeal must succeed. The decision of the learned Judicial Commissioner is set aside and the plaintiffs' suit dismissed with costs throughout.

B.V./R.K.

Appeal allowed.

A. I. R. 1932 Patna 95

MACPHERSON AND FAZL ALI, JJ.

(Mahant) Ram Das—Appellant.

v.

Prem Das—Respondent.

Appeal No. 193 of 1929, Decided on 16th April 1931, from original decree of Dist. Judge, Patna, D/- 24th August 1929.

Succession Act (1925), S. 283 (1) (c),—Person disclaiming interest in estate has no locus standi in Probate Court.

A person disclaiming interest in the estate is not entitled to citation and he has no locus standi in the Probate Court.

Where the persons applying for revocation of a probate make a definite allegation that the deceased who was a Mahant had no estate and that the properties which he purported to make over by the will were properties which he held, not in his personal but in his official capacity and which actually belonged to the Mutt the petitioners have no locus standi to make the application: 17 Cal. 48; 2 I. C. 402 and 39 I. C. 573, *Foll.* [P 96 C 1, 2]

Baldeo Sahay, Kishundeo Prasad and J. K. Prasad—for Appellants.

A. A. Syed Ali and Ahmed Reza—for Respondents.

Macpherson, J.—In this appeal we have not found it necessary to call upon the respondents.

It is preferred from a decision of the District Judge of Patna rejecting an application of February 1929, for revocation of a probate granted in 1916 of the unregistered will of one Beni Das, dated 21st Jeth, 1321 F.

The first petitioner states that he is Mahant of the Piparpanti mutt in the district of Monghyr to which the Pundark math in the Patna district, of which Beni Das, deceased, was Mahant, is subordinate. The other two petitioners state that they and Beni Das were descended from Mahant Nanak Baksh Das as shown

in the genealogy annexed to the petition. They all set out that Prem Das who has obtained probate, having accepted the post of pujari under them and having in 1927 refused to account for the proceeds of the properties they made inquiry and learnt of the will for the first time, whereupon they filed a regular suit but were confronted with the difficulty that the genuineness of the will could not be gone into except in the probate Court. It is admitted that in the regular suit mentioned they claimed that the properties in suit did not belong to the testator but were properties of his mutt or of the Thakurji. In their application for revocation they also set out as follows in para. (9) :

"For that the applicant obtained the grant of probate fraudulently also by concealing from the Court the fact that Beni Das had no property of his own and all the properties detailed in his petition belonged either to the mutt or to the Thakurji and thus no citation was issued to the ultimate Mahant your petitioner No. 1."

Upon this issue No. 5 was framed :

"Are the applicants disqualified from maintaining this application by their denial in para. 9 thereof that the testator had any estate of his own."

This reference is of course to S. 283 (1) (c), Succession Act, under which a citation is to be issued to all persons claiming to have any interest in the estate of the deceased and the numerous decisions that a person disclaiming interest in the estate is not entitled to citation and has no locus standi in the Probate Court. When this issue was framed the petitioners-appellants applied to withdraw para. (9) of their application on the ground that the averment therein contained that the properties detailed in the application for probate never belonged to Beni Das is liable to misconstruction, and purported to explain their ground for revocation as really heirship. The application was rejected by Mr. Wali Mahomed as inconsistent and confusing, and when the case came to trial his successor cited numerous rulings, including *Abhi Ram Das v. Gopal Das* (1), *Srigobind Pershad v. Mt. Lal-jhari Kuar* (2), *Kalajit Singh v. Parmeshar Singh* (3), *Mt. Mahasundar Kuar v. Ratan Prasad Sahi* (4), *Devendra Prasad Sukul v. Surendra Prasad Sukul* (5), and came to the conclusion that, on the state

of the authorities which could not be distinguished and which were binding upon him, he had no option but to hold that the petitioners had no locus standi to maintain the application to revoke the grant of probate.

Mr. Baldeo Sahay on behalf of the appellants eventually comes to the position that he cannot withstand the weight of authority which has been cited. Indeed there are also other decisions to the same effect : *Pirojshah Bikhaji v. Pestonji Merwanji* (6) and *Gopal Chandra Bose v. Asutosh Bose* (7) and the law may be taken to be settled. But the learned advocate strenuously contends that the rulings cited do not cover his case inasmuch as petitioners 2 and 3 are heirs of the deceased in any view of the case. To my mind the petition itself in particular para. (3) taken with the genealogy by which it is expressly controlled, goes to show that petitioners 2 and 3 are not at all blood relations of the deceased Beni Das. The genealogy is a mixture of blood and spiritual relationship and a perusal of it leaves no room for a claim that there is any actual relationship at all between the deceased and petitioners 2 and 3. The application for revocation is really based upon the same dispute as to title as the civil suit is. There is indeed a definite allegation that the deceased had no estate, and the substance of the application is that the properties which the testator purported to make over by will were properties which he held not in his personal but in his official capacity and which actually belonged to the mutt or the Thakur. In my mind it is clear that the decision under appeal is correct and that the petitioners had no locus standi to maintain the application for revocation of the probate.

I would accordingly dismiss the appeal with costs ; hearing fee five gold mohurs.

Fazl Ali, J.—I agree.

R.M./R.K.

Appeal dismissed.

(6) [1910] 34 Bom. 459=6 I.C. 523.

(7) [1913] 20 I.C. 342.

(1) [1889] 17 Cal. 48.

(2) [1910] 2 I.C. 402.

(3) [1917] 39 I.C. 573.

(4) [1916] 35 I.C. 416.

(5) [1920] 5 Pat. L. J. 107=54 I.C. 807.

* * A. I. R. 1932 Patna 97

MACPHERSON AND FAZL ALI, JJ.

Sachindra Mohan Ghose—Plaintiff—Appellant.

v.

Ramjash Agarwalla—Defendant—Respondent.

Appeal No. 93 of 1929, Decided on 2nd June 1931, from decision of Sub-Judge, Dhanbad, D/- 1st March 1929.

(a) **Deed—Construction — Decree creating settlement of land in lieu of future recurring payment is lease—Registration Act (1908), S. 17 (2) (6).**

One of the terms of a compromise embodied in a decree was as follows: "The plaintiff gives up his claim for khas possession which he made regarding the surface land of the disputed mauza, Fatehpur. The defendant will hold possession of the said lands in his purchase rights. The defendant agrees to pay to the plaintiff the annual jama of Rs. 792, for 66 bighas in three plots specified in the schedule below. The defendant pays to the plaintiff Rs. 792, the rent for 1325 B. S. last, and from the current year the defendant will pay the jama to the plaintiff every year in four equal instalments As a security for the payment of the amount of rent and cess with interest due to the plaintiff the aforesaid land and the machinery, workshop and house, etc., thereon shall always be treated as "first charge." So long as the amount of rent, etc., with interest due to the plaintiff will not be paid, the defendant will not be competent to transfer the same to any one by sale or gift or remove the same."

Held: that the decree created a lease because the terms recited therein virtually amount to settlement of 66 bighas of land with the defendant in lieu of a future recurring annual payment and that it was inadmissible in evidence.

[P 98 C 1]

* * (b) **Registration Act (1908), S. 17 (2) (6)—Decree operating to create lease is compulsorily registrable—Evidence Act (1872), S. 92.**

A decree operating to create a lease is not exempt from registration under Cls. (b) and (c) and consequently a lease comprised in the petition of compromise and incorporated in the consent decree is not admissible in evidence under S. 92 if not registered: 3 *Pat. L. J.* 255, *Foll.*; (*Case law discussed*).

[P 100 C 1]

(c) **Registration Act (1908), S. 49—Decree creating lease not registered—No term in it is admissible in evidence.**

If a decree purporting to create a lease is inadmissible in evidence for want of registration, none of the terms of the lease can be admitted in evidence.

[P 101 C 2]

(d) **Registration Act (1908), S. 49—"Collateral purpose."**

To use a document for the purpose of proving an important clause in the lease is not using it for a collateral purpose.

[P 101 C 2]

P. R. Das, S. C. Mazumdar and N. N. Ray—for Appellant.

A. B. Mukherjee and U. N. Banerjee—for Respondent.

Fazl Ali, J.—The main question to be decided in this appeal is whether the plaintiff can recover rent for more than three years prior to the institution of the suit. It appears that in the year 1918 the proprietor of the Jharia Raj Estate, instituted a suit against the defendant for recovery of khas possession of certain lands. The suit was compromised on 11th February 1920, and one of the terms embodied in the decree was as follows:

"The plaintiff gives up his claim for khas possession which he made regarding the surface land of the disputed mauza, Fatehpur. The defendant will hold possession of the said lands in his purchase right. The defendant agrees to pay to the plaintiff the annual jama of Rs. 792 for 66 bighas in three plots specified in the schedule below. The defendant pays to the plaintiff Rs. 792, the rent for 1325 B. S. last and from the current year the defendant will pay the jama to the plaintiff every year in four equal instalments As a security for the payment of the amount of rent and cess with interest due to the plaintiff the aforesaid land and the machineries, workshop and house, etc., thereon shall always be treated as "first charge." So long as the amount of rent, etc., with interest due to the plaintiff will not be paid, the defendant will not be competent to transfer the same to anyone by sale or gift or remove the same."

The present suit was instituted on 14th April 1928, by the receiver of the Jharia Raj Estate to recover the arrears of rent for the years 1327 to 1334 at the rate of Rs. 792 per year as provided for in the petition of compromise which was embodied in the decree. The defendant resisted the suit on various grounds, but his main ground of attack is stated in para. 9 of the written statement which runs as follows:

"That defendant further submits that on account of the nonregistration the decree in suit No. 718 of 1918 is not admissible in evidence and the plaintiff cannot claim any rent from this defendant under the said decree."

At the trial it appears to have been admitted by the defendant that he was liable to pay rent for three years before the institution of the suit and so the Subordinate Judge decreed the plaintiff's claim in part. He held however that the compromise decree relied on by the plaintiff was not admissible in evidence for want of registration and so the plaintiff's claim for arrears prior to three years before the suit was barred by limitation. The plaintiff has now appealed to this Court and the points urged on his behalf are: (1) that the learned Subordinate Judge was wrong in holding that the compromise decree required registration, and (2) that at least the latter part of the decree which pro-

vides that the rent will be treated as a first charge on the land and machineries, etc., does not require registration and that in view of this clause it should have been held that the period of limitation in this case was 12 and not 3 years.

The first question therefore to be considered is whether the compromise decree was inadmissible in evidence for want of registration. The answer to this question depends not only on the proper construction of S. 17, Registration Act, but also on the construction of the decree itself so as to determine whether it operates to create a lease or not. I think there can be no doubt that the decree did create a lease because the terms recited therein virtually amount to a settlement of 66 bighas of land with the defendant in lieu of a future recurring annual payment. Turning now to S. 17 it may be noticed that it is divided into two subsections, the first enumerating the classes of documents which are required to be registered and the second providing that the rule as to compulsory registration would not apply to certain documents which, but for the proviso might fall under sub-S. 1. Under sub-S. 1 there are five classes of documents which are mentioned under Cls. (a) to (e) respectively of which Cl. (a) relates to instruments relating to gift of immovable property and Cl. (d) relates to a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent. So far as this subsection is concerned, its language is plain and can give rise to no serious difficulty. Considerable difficulty however has arisen in interpreting sub-S. (2) read with Cl. (vi) which may be read as follows:

"Nothing in Cls. (b) and (c), sub-S. 1 applies to any decree or order of a Court."

One of the difficult questions which arose in relation to this provision was as to how far it would apply to a decree which incorporates matters which are outside the scope of the suit. The argument which used to be advanced in this connexion was substantially this: that the Court is under no obligation to record a compromise and pass a decree with regard to matters which are extraneous to the suit, and if such matters are embodied in the decree, the decree to that extent is without jurisdiction and is not protected by sub-S. (2). Cl. (vi): see *Gurdeo Singh v. Chandrika Singh* (1). It has however

been held by the Privy Council in *Pranal Anni v. Laxmi Anni* (2) and *Hemanta Kumari Debi v. Midnapur Zamindari Co., Ltd.* (3), that even if the compromise goes beyond the property in suit, it will not, if embodied in the decree, require registration, and the term "decree" as used in Cl. (vi) ought to receive a liberal construction. Thus the effect of these decisions and a number of other decisions is that so far as the compromise decree relates to properties within the scope of the suit, it operates as *res judicata*, but so far as it relates to properties outside the scope of the suit such a decree, if the terms of the compromise are embodied in the decree, is evidence of the term embodied therein. In either case it is not necessary to register such a compromise petition or the decree.

The second difficulty in construing sub-S. (2), S. 17, Cl. (vi), arises in consequence of the fact that it refers only to Cls. (b) and (c) and not to Cls. (a), (d) and (e). Ordinarily construed this clause would mean that a decree or an order of a Court embodying the terms of an instrument coming under S. 17, Cls. (b) and (c), is exempted from registration, but if it embodies the terms of an instrument which comes, for example, under Cls. (a) or (d), that is to say, if it amounts to a gift or a lease, it will not be exempted from registration. In some cases however it was actually suggested if not decided that even if a decree purports to create a lease it would be admissible in evidence though not registered. Whatever doubts and difficulties may have surrounded the interpretation of the subsection before, have been set at rest now by the decision of the Judicial Committee in *Hemanta Kumari Debi v. Midnapur Zamindari Co., Ltd.* (3), and a number of other decisions which have followed it. In *Hemanta Kumari Debi's* case (3) the parties to the suit having compromised it presented a petition to the Court in which one of the terms was that Hemanta Kumar (the plaintiff in that suit) had agreed that if she succeeded in another suit which she had brought to recover certain land other than that to which the compromised suit related she would grant to Watson & Co., a lease of that land

(2) [1899] 22 Mad. 508=26 I. A. 101=7 Sar. 516 (P.C.).

(3) A. I. R. 1919 P. C. 79=53 I. C. 534=46 I. A. 240=47 Cal. 485 (P.C.).

(1) [1909] 36 Cal. 193=1 I. C. 913.

upon specified terms, and prayed for a decree in terms of the compromise. A decree was thereupon passed by the Court and the petition was recited in full in the decree. Hemanta Kumari succeeded in the suit which she had brought to recover the other land, but she refused to grant a lease of the land to the assignees of Watson & Co. The latter therefore brought a suit against Hemanta Kumari for specific performance of the agreement of the lease comprised in the petition of compromise and incorporated in the consent decree. The High Court of Calcutta decreed specific performance. One of the questions which arose before the Judicial Committee was whether the petition of compromise which contained the agreement of which specific performance was sought required registration. Lord Buckmaster, in delivering the judgment of the Judicial Committee on this point observed as follows:

"If the document in question can be regarded as a lease within the meaning of this definition, it could not be received in evidence. Their Lordships are of opinion that it cannot be so regarded. 'An agreement for a lease' which a lease is by the statute declared to include, must in their Lordships' opinion be a document which effects an actual demise and operates as a lease. The present agreement is an agreement that upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not, in their Lordships' opinion, satisfy the meaning of the phrase 'agreement for a lease.' So far therefore as this decision depends upon the need for registration of the document as a lease, the Registration Act, places no obstacle in the respondents' way. By S. 17 (1) (b) however it is also provided that other nontestamentary instruments which purport or operate to create, whether in present or in future any right, title or interest vested or contingent, of the value of Rs. 100 and upwards to or in immovable property, need registration. But this is subject to the exception provided in sub-S. (2), S. 17 which states that 'nothing in Cls. (b) and (c), sub-S. (1) applies to' among other things 'any decree or order of a Court.' If therefore the decree in the present case can be regarded as a decree within the meaning of that exception, there is nothing in the Registration Act to affect the matter."

Now, this reasoning plainly suggests that all decrees and orders are not excluded from compulsory registration, but only those are excluded which partake of the character of the documents mentioned in Cls. (b) and (c), sub-S. (1), and if the consent decree operated to create a lease, it would, in their Lordships opinion, have

required registration. This is exactly how this decision was construed by the Calcutta High Court in *Rajani Kanta v. Raj Kumari* (4). In that case Rankin, C. J., who delivered the judgment, Mitter, J. agreeing, dealt with the question as follows:

"The first question therefore is whether the solenama requires any registration as being a lease. There can be no doubt that the intention of it was to operate as the grant of a tenancy to take effect at once, and in my judgment there is no escape from the conclusion that it was a lease. That being so, there is no escape from the further conclusion that it is not exempt as being an order or a decree of the Court, from the requirement of registration, because that requirement is only forgone on the face of S. 17, Registration Act, in cases coming within Cls. (b) and (c), sub-S. (1), S. 17. This was clearly held by the Privy Council in the judgment delivered by Lord Buckmaster in the case of *Hemanta Kumari Debi v. Midnapur Zamindari Co., Ltd.* (3)."

In *Sarat Chandra Das v. Sarojini* (5), another Division Bench of the Calcutta High Court held that the question was "now concluded by the ruling of their Lordships in *Hemanta Kumari's* case (3)."

The same view has been held by the Calcutta High Court in several other cases: see *Nazar Ali v. Indra Kumar* (6), *Janaki Nath v. Mahendra Narain* (7) and *Sailesh Chandra v. Bireswar, A. I. R. 1930 Calcutta 559*. The Lahore High Court has also recently held it *Attar Chand v. Chand Lal* (8), that Cl. (b), sub-S. (2), S. 17 is not applicable to a lease. Again in *Charu Chandra Mitter v. Sambhu Nath Pande* (9), a case decided by a Full Bench of this Court, Atkinson, J., after referring to the decision of the Judicial Committee in *Bindesri Naik v. Ganga Saran Sahu* (10), to which I shall also have to refer presently said:

"I am aware that a more extended interpretation has been given to this decision by the learned Judges who decided the case of *Natesa Chetti v. Vengu Nachiar* (11). So wide is the interpretation which their Lordships attributed in that case to the decision of the Privy Council in *Bindesri Naik v. Ganga Saran Saha* (10), that practically it would apply so as to cover the case of the grant of a lease as a matter of compro-

(4) A. I. R. 1927 Cal. 913=104 I. C. 812.

(5) A. I. R. 1924 Cal. 135=79 I. C. 257.

(6) A. I. R. 1929 Cal. 462=118 I. C. 895=56 Cal. 427.

(7) A. I. R. 1930 Cal. 94=126 I. C. 550=57 Cal. 775.

(8) A. I. R. 1929 Lah. 291=117 I. C. 240=10 Lah. 685.

(9) [1918] 3 Pat. L. J. 255=46 I. C. 358 (F.B.).

(10) [1898] 20 All. 171=25 I. A. 9=7 Sar. 273 (P. C.).

(11) [1910] 33 Mad. 102=3 I. C. 701.

mise in a judicial proceeding in a pending litigation which would apparently be within the provisions of Cl. (d), S. 17, Registration Act. We wish to be clearly understood for the purposes of our decision in this case that we do not consider that the decision of their Lordships of the Privy Council is wide enough to cover the case of a document constituting a lease arising out of the compromise in a judicial proceeding within the provisions of Cl. (d), sub-S. (1), S. 17, Registration Act. We think it applies to documents coming within the class of documents contemplated in Cls. (b) and (c) which are protected under the provisions of Cl. (6), sub-S. (2), S. 17, Registration Act, from registration."

This view also seems to have been accepted in another decision of this Court: see *Rampadarath Singh v. Sohrai Koeri* (12). It appears to me therefore that it is now too late to contend that a decree even though it operates to create a lease, does not require registration under S. 17, Registration Act. It is true that the provisions requiring a decree to be registered seem to be not so very necessary, because the same results which are intended to be secured by the registration of a document may also be secured by the document being embodied as a part of a decree. But the language of S. 17 as well as S. 29-A, Registration Act, shows that the framers of the Act did not intend to exclude decrees from registration and this is also clear from the amendment recently made in the Registration Act, after the decision in *Hemanta Kumari's* case (3) by inserting the following words in Cl. (6), sub-S. (2): "except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of a suit or proceeding."

Mr. P. R. Das however appearing for the appellant does not concede that the view to which I have referred is based on a correct reading of S. 17 and he relies on the decisions in *Bindesri Naik v. Ganga Saran Sahu* (10), *Natesa Chetti v. Vengu Nachiar* (11), *Ambica Charan Sher Kaibatra v. Srinath Datta* (13), *Hemanta Kumari Debi v. Midnapur Zamindari Co., Ltd.* (3) and *Charu Chandra Mitra v. Sambhu Nath Pandey* (9). The last two cases, as I have already shown far from favouring Mr. Das's contention negative the view which he is trying to support; but the other three cases may be briefly dealt with. In *Bindesri Naik v. Ganga Saran Sahu* (10) the dispute between the parties was whether the plaintiff was entitled to recover interest on a secured loan after the date fixed for payment in the

instrument of mortgage. The High Court held that by reason of various petitions of adjournment in which both parties had joined, the defendant had admitted the liability to pay post diem interest. The defendant however contended throughout that the petitions could not be relied on by the plaintiff as they were not registered in accordance with the provisions of the Registration Act. The Privy Council came to the conclusion on the construction of the mortgage deed itself that the interest was payable but they also added :

"although in the view which their Lordships take, the question whether those proceedings can be founded on without their having been registered in terms of the Registration Act, does not necessarily arise in this appeal, they think it right to add that having heard counsel fully upon the point they are satisfied that the provisions of S. 17 of the Act, did not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or of orders made by the Court."

These observations have been explained in several cases including the Full Bench decision of this Court to which I have already referred and it is clear that as none of the documents relied on in the case with which their Lordships had to deal fell under Cl. (a), (d) or (e), sub-S. (1), S. 17, their Lordships had no occasion to make a pronouncement as to what the effect would have been, if any of these documents fell under any of the clauses which have not been specifically mentioned in S. 17, sub-S. (2). As to the case of *Natesa Chetti v. Vengu Nachiar* (11) I have already referred to the remarks of Atkinson, J., in *Charu Chandra Mitra's* case (9) that it attributes too wide an interpretation to the decision of the Privy Council in *Bindesri Naik v. Ganga Saran Sahu* (10) and I take it that if it was meant to be laid down in that case that a decree, even though it purports to create a lease need not be registered, that view did not find favour with the Full Bench of this Court. The view that was put forward in that case was that sub-S. (2) is in the nature of a proviso and:

"that provisos are often inserted unnecessarily excepting cases which could not otherwise fall within the enactment for the purpose of removing apprehensions and so cases which are otherwise clearly outside the scope of an enactment cannot be brought within it by any inference founded on the terms of the proviso."

I would however say with great respect that this reasoning assumes that the exceptions referred to under sub-S. (2) would have been, even in the absence of that

(12) [1919] 4 Pat. L. J. 667=52 I. C. 20.

(13) [1913] 19 I. C. 551.

subsection, outside the scope of S. 17, sub-S. (1). Besides whatever observations were made by the learned Judges who decided that case as to the application of S. 17 to such compromise decrees as operate to create a lease may be taken to be in the nature of mere obiter dicta because their Lordships themselves while dealing with the compromise in that case said:

"Now we are not clear that we are bound to construe the compromise as creating a new lease so as to give an opportunity for the objection."

In any event that decision can no longer be followed after the decision of *Hemanta Kumari's* case (3).

The argument of Mr. P. R. Das which is to the effect that only Cls. (b) and (c), sub-S. (1) were mentioned in sub-S. (2) because they are comprehensive enough to include the documents which came under the other clauses which were not mentioned including Cl. (d) may also be met on the same reasoning and it may also be pointed out that if it was intended by the legislature to include in sub-S. (2) documents falling under Cls. (a), (d) and (e) also, it was hardly necessary to mention specifically Cls. (b) and (c) and omit the other clauses. In that case it would have been sufficient to say that:

"nothing in sub-S. (1) would apply to the classes of documents enumerated in sub-S. (2)."

As regards the decision of Sir Lawrence Jenkins in *Ambica Charan Sher Kaibarta v. Srinath Dutta* (13), it may be pointed out that it was based entirely on the decision in *Natesa Chetti v. Vengu Nachiar* (11) and besides the facts of the case not being fully stated in the report, we do not know whether the particular document referred to in that case did come under S. 17, sub-S. (1) Cl. (d), Registration Act. The suit was for recovery of rent and the plaintiff's case was that the pro forma defendant had created a kaimi maurosi interest in his favour. The pro forma defendant admitted this, but the contesting defendant contended that the document by which the kaimi interest was created, should have been registered. It was found that the compromise related to the suit and its subject-matter and it was held therefore that S. 17, Registration Act, afforded no answer to the plaintiff's claim. Besides, even assuming that it was laid down by implication in this case that if a lease is incorporated in the decree, it does not require registration, it cannot be regarded

as an authority for the proposition after the decision of *Hemanta Kumari's* case (3) and the other cases of the Calcutta High Court to which I have referred. It is true that this case was referred to with approval by Atkinson, J., in *Charu Chandra Mitra's* case (9), but I take it that it was referred to merely as supporting the proposition that even though the decree or order of the Court does not expressly incorporate verbatim the entire provisions of the compromise, it is within the protection provided by Cl. (vi), sub-S. (2), S. 17, Registration Act. It was also referred to as one of the cases in which the decision in *Gurdeo Singh v. Chandrika Singh* (1) was not followed.

I will now pass on to consider the next point raised by Mr. Das, that is to say, that at least the latter part of the decree, which provides that rent will be a charge on the land, should be admitted in evidence because this statement standing by itself does not constitute a lease or come within the mischief of Cl. (d), sub-S. (1), S. 17, Registration Act. It is pointed out on behalf of the respondents that this is after all one of the important clauses of the lease and if the decree is inadmissible in evidence because it operates to create a lease, then none of the terms of the lease can be admitted in evidence. It appears to me that this argument substantially meets Mr. Das's contention. It is however urged by Mr. Das that an unregistered document which is required to be registered may be used in evidence for a collateral purpose and reliance is placed on *Sarat Chandra Das v. Sarojini* (5) where a compromise decree was excluded on the ground that it ought to have been registered as a document incorporating the lease, but an admission made therein as to the amount of rent was used for the purpose of fixing the liability of the lessee. It is also urged by Mr. Das that the compromise having been acted upon, the terms of the compromise may be proved not by the document, but by the actings of the parties. Now, I am not prepared to hold that to use the document for the purpose of proving an important clause in the lease would be using it for a collateral purpose. As to the acting of the parties, although the fact as to what is the amount of the rent payable in this case might be legitimately proved by showing that such rent has actually been paid in the past by the defendant, I do not see any evi-

dence of conduct or any act of the parties which would prove that the parties had actually made rent a charge on the property.

It appears to me therefore that the Subordinate Judge was right in holding that the terms of the compromise, even though embodied in the decree were, not admissible in evidence and that being so, the plaintiff is not entitled to recover more than three years rent or compensation for the occupation of the land which was admittedly in possession of the defendant. The appeal therefore fails and is dismissed with costs.

Macpherson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

*** * A. I. R. 1932 Patna 102**

COURTNEY-TERRELL, C. J. AND
DHAVLE, J.

Sachindra Mohan Ghosh—Assessee.

v.

Commissioner of Income-tax, Bihar and Orissa—Referee.

Misc. Judicial Case No. 39 of 1930, Decided on 20th May 1931.

*** * Income-tax Act (1922), S. 12 (2) — Receiver appointed of estate part of income being taxable and part non-taxable—Portion of receiver's salary is allowable as expenditure under S. 12 (2).**

A receiver appointed by the Court by reason of litigation is in the same position as though he were a manager appointed on behalf of a minor or a sick person who could not personally manage the estate and was forced to have somebody appointed for that purpose. [P 102 C 2]

Where in the case of a receiver so appointed, his functions were twofold; viz., (1) that he had to manage that part of the estate of which the income was not assessable, that is to say, the agricultural part of the estate; and (2) that part of the estate of which the income was taxable, that is to say, the property which produced the mining royalties, and it was contended under S. 12 (2) that if any part of the salary paid to the manager was to be attributed to some function other than that of making or earning of the taxable income no part of the aggregate salary would be split off and treated as attributable to the making or earning of the income.

Held: that sub-S. (2) did not require that the whole of the receiver's salary should be incurred solely for the purpose of earning income before any part of it could be deducted even if such part may represent no more than the receiver's services in earning the income, and that a portion of the salary was allowable as expenditure under sub-S. (2). [P 103 C 1]

K. P. Jayaswal and N. N. Roy — for Assessee.

C. M. Agarwala—for Commissioner of Income-tax.

Courtney-Terrell, C. J.—The facts which have given rise to the present reference may be simply stated. The assessee is the receiver and manager appointed by the High Court of Calcutta to take charge of and manage the property known as the Jheria Raj estate. He was appointed in proceedings in which the widows of the late proprietor sued the present proprietor and he was appointed at a salary of Rs. 1,000 a month. The property of the Raj consists to the extent of an annual income of about 6 lakhs, of mining royalties and to the extent of about Rs. 60,000 of agricultural income which of course is not taxable under the Income-tax Act. The assessee claimed under S. 12 (2) of the Act to deduct his salary as an allowance for expenditure incurred solely for the purpose of making or earning the income of the estate. The Income-tax Officer allowed as a deduction one half of the salary. The matter went on appeal before the Assistant Commissioner and he disallowed the salary altogether as a deduction on the ground, as stated by him, that the purpose of the appointment of the receiver was merely that he might look after the interests of the parties to the litigation and that he was not appointed for the purpose of earning the income of the estate. This view of the matter has been upheld by the Commissioner on appeal and the case reaches us for final decision.

First, it may be said that, so far as the assessee's position as a manager is concerned the mere fact that he was appointed by the Court by reason of litigation to my mind makes no difference at all. He is in exactly the same position as though he were a manager appointed on behalf of a minor or a sick person who could not personally manage the estate and was forced to have somebody appointed for that purpose. His functions are twofold. He has to manage that part of the estate of which the income is not assessable, that is to say, the agricultural part of the estate, and he also has to manage that part of the estate of which the income is taxable, that is to say the property which produces the mining royalties. Sub-S. (2), S. 12, Income-tax Act is as follows:

"Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that

no allowance shall be made on account of any personal expenses of the assessee."

Now it is contended on behalf of the department that the true construction of this section is that if any part of the salary paid to the manager is to be attributed to some function other than that of making or earning of the taxable income no part of the aggregate salary may be split off and treated as attributable to the making or earning of the income. But in my opinion sub-S. (2) does not require that the whole of the receiver's salary should be incurred solely for the purpose of earning income before any part of it can be deducted even if such part may represent no more than the receiver's services in earning the income. The most cogent illustration of the position was that, I think, offered in the course of the argument by my brother Dhavle who put the case in this way: Suppose that there had formerly been two managers, one to manage the agricultural part of the estate and the other to manage the royalty part, and suppose the former was paid Rs. 200 a month and the latter Rs. 800 a month. In such circumstances it could not be doubted that the salary paid at the rate of Rs. 800 a month could be deducted as being incurred solely for the purpose of making or earning the royalty income. But if it was found as a matter of convenience better to appoint a single manager at Rs. 1,000 a month to carry on both such functions, if that course were taken, could it be argued that no part of the salary of such a manager could be attributed to the earning of the royalty income? In my opinion the answer to the question propounded, that is to say, is any portion of the salary of the receiver allowable as expenditure under sub-S. (2), S. 12, should be in the affirmative. We are not called upon to state what the proportion attributable to the tax-paying part of the estate is or what amount should be deducted. That will be for the proper tribunal when the question arises. The assessee having succeeded in his contention should, in my opinion, receive Rs. 200 as his costs.

Dhavle, J.—I agree.

K.N./R.K. *Answer affirmatively.*

A. I. R. 1932 Patna 103

COURTNEY-TERRELL, C. J. AND
DHAVLE, J.

Basant Lal Ramjidas—Assessee.

v.

Commissioner of Income-tax, Bihar and Orissa—Referee.

Misc. Judicial Case No. 86 of 1929, Decided on 20th May 1931.

(a) **Court-fees Act (1870), Sch. 2, Art. 1 (a), para. 5** — **Application for certified copy of order of Assistant Commissioner of Income-tax should bear two annas court-fee stamp.**

The most material words of the paragraph are the words "judgments, decrees or order passed by such Court, Board or officer" and they are intended to cover every case of every kind in which a judgment, decree or order has been passed by any Court, Board or officer capable of passing such judgment, decree or order and having regard to what is the proper meaning of the words, it certainly covers an application to an Assistant Commissioner of Income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preferring an appeal to the Commissioner under the Income-tax Act. Therefore an application for a certified copy of the order of the Assistant Commissioner of Income-tax should bear a two annas court-fee stamp. [P 105 C 1]

(b) **Income-tax Act (1922), Ss. 61 and 66 (2)** — **Application by pleader for certified copy of judgment of Assistant Commissioner of Income-tax should be accompanied by vakalat-nama—Time for limitation is computed from date of valid application and not from date of one not in order.**

Proceedings under the Income-tax Act are of a most secret character and heavy penalties are imposed upon any officer who makes disclosures of matters which under the Act are confidential and nothing can be considered more confidential than the actual assessment which is made. As an agent duly authorized to conduct the business of the appeal before the Assistant Commissioner is not ipso facto authorized to obtain copies of the Assistant Commissioner's judgment or indeed to perform any act preparatory or incidental to the conduct of an appeal because the assessee may change his mind and engage some one else, any person asking for a copy of the judgment should be expressly authorized in writing in that behalf and the application for a copy of the judgment is properly within the meaning of S. 61—"attendance before an income-tax officer" in connexion with proceedings under the Act.

An application by a pleader of the assessee for a copy of the judgment of the Assistant Commissioner of Income-tax which is not accompanied by a vakalatnama, expressly authorizing him to obtain such a copy and which is not properly stamped with a court-fee stamp of two annas, is not a valid application and inasmuch as the authorities are not bound to take any notice of an application which is not in order, it cannot help the assessee in computing the time, which he is allowed to deduct, for purposes of limitation. Time for that purpose can only be computed from the date of the valid application and not from the date of an application which is not in order.

[P 105 C 1, 2]

K. P. Jayaswal and *A. K. Mitra*—for Assessee.

C. M. Agarwala—for Commr. of Income-tax.

Courtney-Terrell, C. J.—The first and preliminary point which has to be decided in this case is one of limitation, and it has been stated by the Commissioner for the opinion of the Court. The question is whether the application which was made under S. 66(2), Income-tax Act, by the assessee was in time reckoning the period of one month from the date of the passing of the appellate order made by the Assistant Commissioner. The appellate order was passed on 31st March 1929. The first application purporting to be under S. 66(2) was received in the office of the Commissioner on 16th May 1929, that is to say it was, if that date was to be taken as the correct date, 16 days out of time. The applicant purports on this basis to say that the 16 days was consumed in obtaining a copy of the appellate order.

On 15th April the pleader who had argued the case before the Assistant Commissioner sent a letter to the office of the Assistant Commissioner accompanied by a one-anna stamp asking for a copy of the Assistant Commissioner's appellate order. He further asked to be informed of the estimate of cost for the certified copy and said that on receipt of that notification he would deposit the sum in the local treasury. Furthermore, his application was not accompanied by a vakalatnama from the assessee expressly authorizing him to obtain a copy of the Assistant Commissioner's decision. The applicant was asked by postcard to file a court-fee stamp of two annas as well as an express authorization to enable the pleader to obtain the copy. On 21st April he did in fact file the authorization and the court-fee stamp of two annas and his application was then found to be in order and the copy was made ready on 3rd May and was despatched by post to the address of the applicant and received by him, it must be presumed, on 4th May. Such are the facts as found by the Commissioner.

The department say that the application of 15th April was not an application at all. It suffered from two defects which prevented it from being considered as such, the first defect being that it did not bear a stamp of two annas but one of one anna only; the second being that,

it did not contain an express authorization in writing signed by the assessee himself. In answer to this objection by the department the assessee contends that the fee of two annas cannot legally be exacted. If we turn to Sch. 2, Court-fees Act, we see set forth detailed provisions as to certain documents in the nature of applications or petitions which must bear the stamp fee prescribed by the particular Local Government, the matter of the precise stamp fee being within their purview as independent finance authorities. Now the scale of so-called fixed fees set forth in this schedule is divided up into classes respectively marked (a) and (b). Taking the documents referred to in group (a) first, the first paragraph refers to applications or petitions which are made by any persons having dealings with the Government and relating to the subject-matter of these dealings when such application is presented to any officer of the Customs or Excise department or to any Magistrate, and a fee of two annas is leviable upon such applications. The second paragraph refers to applications or petitions by persons holding temporarily settled land under direct engagement with the Government and relating to such subject-matter. The third paragraph refers to applications which relate to conservancy or improvements of a municipal character. The fourth paragraph refers to applications to civil Courts and Small Cause Courts and to Collectors of revenue in cases where the amount of the value of the subject-matter is less than fifty rupees. The fifth paragraph, which is one with which we are particularly concerned, refers to applications for obtaining copies or translations of judgments, decrees or orders which have been passed by Courts, Boards or officers and in respect of those applications also a fee of two annas is required. That particular paragraph opens with the words

"or when presented to any civil, criminal or Revenue Court or to any Board or executive officer,"

and it is argued by Mr. Jayaswal on behalf of the assessee that in this matter the Assistant Commissioner cannot come under the head of the Revenue Court; and he is not, according to his argument, an executive officer and therefore that judgments, decrees or orders which are passed by him do not come within the purview of this paragraph. In my opinion that is

giving in the first place undue weight to the first words of the paragraph which are not the most material words. The most material words of the paragraph are the words "judgments, decrees or order passed by such Court, Board or officer" and they are intended to cover every case of every kind in which a judgment, decree or order has been passed by any Court, Board or officer capable of passing such judgment, decree or order and having regard to what I think is the proper meaning of the words it certainly covers an application to an Assistant Commissioner of Income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preferring an appeal to the Commissioner under the Income-tax Act.

The second defect in the notice of the 15th April was that it was not properly authorized by vakalatnama. The justification for the demand of such express authorization is to be found in two matters in the Income-tax Act. In the first place there is S. 61 which states as follows:

"Any assessee, who is entitled or required to attend before any income-tax authority in connexion with any proceedings under this Act, may attend either in person or by any person authorized by him in writing in this behalf."

The next point to be considered in the Income-tax Act is that the proceedings are of a most secret character and heavy penalties are imposed upon any officer who makes disclosures of matters which under the Act are confidential and nothing can be considered more confidential than the actual assessment which is made. Now it does not follow that because an agent is duly authorized to conduct the business of the appeal before the Assistant Commissioner he is ipso facto authorized to obtain copies of the Assistant Commissioner's judgment or indeed to perform any act preparatory or incident to the conduct of an appeal. It is, as the learned Assistant Government Advocate points out, quite conceivable that whatever the merits of the gentleman who was employed in conducting the appeal before the Assistant Commissioner his services may be dispensed with after the matter had passed the Assistant Commissioner's hands; and it is quite conceivable that circumstances might arise in which it was considered by the assessee highly undesirable that he should receive copies of the decision which had actually been given. In these circumstances it was reasonable

and proper for the department to require that any person asking for a copy of the judgment should be expressly authorized in writing in that behalf and the application for a copy of the judgment is properly within the meaning of S. 61—"attendance before an income-tax officer"—in connexion with proceedings under the Act. Inasmuch as the application dated 15th April cannot be considered to be a valid application, and inasmuch as the authorities are not bound to take any notice of an application which is not in order the time which the assessee was entitled to deduct would only run from 21st April when he in fact put his application in order forwarding the proper stamp and the letter of authorization and in these circumstances the time which he is allowed to deduct falls short by one day of the allowance which would bring him within the period of one month. In these circumstances the application before the Commissioner for the statement of the case was barred and we are not competent to go into the other matters which were raised by the Commissioner on the hypothesis that his view as to limitation might be unsound. I would therefore answer the question of the Commissioner as to whether the application before him was barred in the affirmative and would decline to go into the other points raised in the statement of the case. The application to state a case was made at the instance of the assessee who fails and he must pay Rs. 200 by way of costs.

Dhale, J.—I agree.

K.N./R.K. *Answered affirmatively.*

* A. I. R. 1932 Patna 105

WORT AND FAZL ALI, JJ.

Sm. Purnima Debya and another — Appellants.

v.

Nand Lal Ojha & others—Respondents.
First Appeals Nos. 141 and 142 of 1928, Decided on 21st May 1931, against decision of Sub-Judge, Manbhum, D/- 30th November 1927.

* (a) Civil P. C. (1908), S. 11—Decree based on award in Small Cause Court suit does not operate as res judicata in subsequent suit.

Where a decree passed on contest in Small Cause Court suit cannot operate as res judicata in a subsequent suit the decree based upon an award in the same suit or the award itself cannot operate to make any matters decided thereby res judicata : 33 Cal. 881 and 19 Mad. 290, Dist.

[P 110 C 2]

*(b) Evidence Act (1872), Ss. 40 to 42—Whether certain judgment pronounced in another case is or is not relevant is to be governed by Ss. 40 to 42.

The Evidence Act itself does not draw a distinction between a judgment which is not inter partes and a judgment which is inter partes, except where the judgment is clearly *res judicata*. The logical view therefore is that unless a judgment is relevant under Ss. 40 to 42, it is not evidence at all so far as regards the matter which it decides.

A judgment other than a judgment referred to in Ss. 40 to 42 may be admissible to prove that a right was asserted or denied under S. 13, or to explain or introduce facts in issue or to explain the history of the case. But there is nothing in the Act, which would warrant the view that the actual decision or the finding arrived at in a previous judgment can be used as evidence to decide the points which are in issue in a particular case. Such a decision may by virtue of specific provisions operate as *res judicata* or be relevant as a pronouncement on matters of public nature but otherwise it is no better than a mere opinion expressed on the issues involved in a particular case and the Evidence Act is clear that "opinion" will be relevant in those cases only which are specifically referred to in the Act and not in others: (*Case law discussed.*) [P 112 C 1, 2]

(c) Hindu Law—Partition—What amounts to separation depends on facts of each case—Intention is the test.

In the absence of an explicit declaration, the evidence of conduct as well as of the surrounding circumstances is material for the purpose of judging whether the members intended to separate or not. Mere cesser of commensality or separate enjoyment of distinct portions of the properties or separate definement of shares in revenue or survey paper or mere proof of separate transactions entered into by the co-parceners with strangers will not be conclusive to prove the separation in estate. It does not however necessarily follow that even though all these elements may be present in a case no matter what special significance any of these various circumstances may have having regard to the facts of a particular case, they can under no circumstances be sufficient to prove separation. Even cesser of commensality may properly be considered in determining the question whether there was a partition of the joint family or not. Similarly any one or more of the other circumstances referred to above may have a special significance or bearing on the intention of the parties and therefore decisive in a particular case having regard to its peculiar circumstances though the same circumstances or set of circumstances may not be quite conclusive in another case: *A. I. R. 1927 P. C. 224; 14 M. I. A. 412 (P.C.) and 31 Cal. 262, Ref.*

When a partial partition is proved or admitted to have taken place, the presumption is that there has been an entire partition both with reference to rights and properties: *32 Mad. 191; 26 I. C. 514 and 31 I. C. 674, Ref.* [P 115 1, C 2]

(d) Fraud—Undue influence.

A case of undue influence is not quite the same as a case of fraud. [P 117 C 1]

(e) Deed—Construction—Particular passage should not be isolated.

It is most unsafe to isolate any particular pass-

age in the document from its context for the purpose of discovering what the intention of the parties was when the document was written.

[P 113 C 2]

(f) Hindu Law—Joint family—Self-acquired property.

Where the family is joint, the mere fact that a certain property has been acquired in the name of one of the members only, does not necessarily make it the sole property of that particular member. But where one of the members, in whose name the property stands, brings a criminal case for trespass against another member in respect of that property, it may be presumed that the property is the self-acquired property of that member and not joint family property. [P 114 C 1]

(g) Hindu law—Partition—Holding separate property for convenience is different from partition.

A mere agreement to hold separate properties for the sake of convenience is quite different from getting one's share in the joint property by means of a division or partition. [P 113 C 2]

A. K. Roy, R. S. Chatterji and S. S. Prashad Singh—for Appellants.

A. B. Mukherjee and B. B. Mukherjee—for Respondents.

Fazl Ali, J.—These appeals arise out of two suits which were tried together by the Subordinate Judge of Manbhum and which were instituted under circumstances which will presently appear.

One Bechan Ojha had two sons, Baijnath Ojha and Biswanath Ojha. Baijnath Ojha died leaving behind a widow Mt. Rashooni and a son Ramlal Ojha and Biswanath died leaving a son Nandlal. It is common ground that Nandlal and Ramlal remained joint till the year 1295 B. S. or 1888. It is further fully established that the two cousins not only separated in mess in the year 1888, but also divided their moveables as well as *nij-jote* lands which they began to cultivate separately. The only properties which were not divided were those in mauzas Tilai and Sirkabad. Between 1895 and 1900 a fresh property which is referred to in Sch. 4 of the plaint filed in Suit No. 3 and which may be called the Jerka property was acquired in Ramlal's name by three separate deeds, one of which was virtually a *kobala* or a sale-deed and the other two leases. In Baisak 1314, or April 1907, Ramlal died leaving behind him two widows Umamayi and Purnima and a daughter by Umamayi named Amodbala and it is hardly necessary to say that under the Hindu law, if Ramlal died in state of jointness with Nandlal, the latter became entitled to the entire property by the rule of survivorship; but on the other hand, if he had separated from

Nandlal before his death, his two widows were entitled to succeed to his property. In September 1908, Umamayi settled Ramlal's share in Manirambad lands in village Sirkabad with one Kartik Mahto who executed a registered kabuliyat in her favour and the boundaries given in the documents show that the lands of Nandlal in this chak were quite separate from those of Ramlal. In November 1908, Umamayi and her co-widow Purnima describing themselves as the heirs of Ramlal Ojha brought a suit against Mangal Bhumij and Amar Singh Sardar for the possession of certain lands in village Jerka and the suit was compromised.

It may be mentioned here that Amar Sardar, one of the defendants in this suit, was no other person than the proprietor of Jerka from whom Ramlal had acquired the Jerka property. In February 1909, Umamayi and Purnima brought a Small Cause Court suit against Nandlal Ojha for the recovery of a certain sum of money on the allegation that he had realized not only his share, but their share of the rent also from certain tenants in village Tilai. The suit was contested by Nandlal on various grounds one of which was that he was entitled to the entire property left by Ramlal as survivor. The matter was referred to the arbitration of three pleaders of Purulia and by their award they upheld the claim of the widow and overruled the plea that Ramlal was joint with Nandlal and the latter was entitled to the property by way of survivorship. This award being accepted by the Court a decree was passed accordingly. In execution of the decree Umamayi proceeded to attach Nandlal's share in village Tilai, but Nandlal paid the decretal amount and a petition of satisfaction was filed. From 1909 onwards up to her death which took place in the year 1916 Umamayi continued to possess and deal with the properties as if she and her co-widow were the heirs of Ramlal and no step appears to have been taken by Nandlal either to question her rights or to get an adjudication as to his claim of survivorship.

In August 1909, Amar Singh Sardar who had granted the previous leases to her husband gave to her and not to Nandlal a fresh patta in respect of certain lands in village Jerka which she had purchased from one Kuna Laya and thereby recognized her as a tenant in respect of

those lands. In 1913 she and her co-widow Purnima applied for and obtained a succession certificate from the District Judge of Manbhum-Sambalpur. In June 1914, she granted a lease to Kartik Mahto in respect of Manirambad lands for a further period of five years. In 1915 Amar Singh Sardar, the proprietor of Jerka, sued her and obtained a decree against her for arrears of cess in respect of village Jerka. The documentary evidence filed by Nandlal also supports the case that Umamayi was in undisturbed possession of at least Tilai and Jerka so long as she was alive and in fact he attempts to explain her possession by setting up a story that she was allowed to remain in possession in lieu of maintenance. It is impossible however to accept this explanation in view of the fact that Umamayi had been asserting throughout that she was holding the property as an heir of Ramlal and also because no such case as is now set up by Nandlal was set up either in his plaint in Suit No. 3 nor in his written statement in Suit No. 50. It is true that Nandlal did contend, though unsuccessfully, before the Settlement Court in the year 1921 that Umamayi was in possession of Jerka in lieu of maintenance but what was contended before us was that she was in possession of not only Jerka, but also of Tilai in the aforesaid capacity. Again, if Umamayi was allowed by Nandlal to be in possession in lieu of maintenance, there seems to be no good reason for his not showing similar indulgence to Purnima, who was equally entitled to maintenance. On the other hand, what we find is that soon after Umamayi's death Nandlal attempted once more to secure for himself the entire property.

It appears that when Umamayi died Purnima was still quite young, for even according to the estimate of her age given by Nagendra Nath Chakravarty, a witness for Nandlal, she must have been about 14 or 15 years of age at the time, while according to the other witnesses she was still younger (vide P. W. 3). The settlement operations were also to commence shortly in the district and in fact they actually commenced about the year 1920. Thus we find that in January 1918, Nandlal obtained two kabuliyats in his favour in respect of certain lands in Sirkabad (Exs. 11 and 20). Again on 31st January 1918, he got an ekrarnama from one Dharup Singh Sardar by which the

latter was given the right to fish in a tank appertaining to Jerka for a period of four months. We also find that in the same year he obtained certain rent receipts in respect of village Jerka, Exs. 14 (c), (d), (e) and (f), though it is to be noted that he has not filed any receipts in respect of this village of a date prior to the year 1325 or 1918 and the other receipts which he has filed relate to the year 1332. There were also two rent suits brought against him in respect of lands in village Sirkabad and both the suits were allowed to be decreed ex parte though curiously enough the period for which the two suits were brought to some extent overlapped each other. Meanwhile about the year 1920 settlement operations began and once more it was asserted by Nandlal that Ramlal had died in a state of jointness with him and so he was entitled to the entire property of the family by survivorship. Thus a dispute arose before the settlement officers in charge of Khanapuri and attestation work as to whether the name of Nandlal or that of Purnima and Amodebala Debya, the daughter of Ramlal, should be entered in respect of village Jerka and Ramlal's share in village Tilai and Sirkabad. Nandlal wholly failed with regard to Tilai and Jerka and ultimately khewats were prepared in the name of Purnima in respect of these villages [D (1), D (2), Z, 31]. With regard to Sirkabad however Nandlal was partially successful, and on 30th July 1921 he preferred an objection under S. 83, Cl. (1), and S. 111, Cl. (1), Chota Nagpur Tenancy Act, praying that :

"after striking off the name of Sreemati Purnimamai Debya the khatian may be amended by preparing the 16-annas khewats in the name of Nandlal Ojha "

This objection was decided in his favour on 5th September 1921, on the ground that one Sashi Bhusan Ojha, who was the agent and brother of Purnima had admitted the objector's claims and stated before the settlement officer that his sister Purnima had got no share and that according to Mitakshara she was not entitled to any share. Relying upon this admission the settlement officer cancelled Purnima's khewat and recorded an order that the khewat should be prepared in the name of Nandlal. In connexion with this entry it was pointed out in this Court on behalf of Purnima that Ex. 24 which purports to be a general power-of-attorney given by Purnima to Sashi Bhusan Ojha

(who is not her brother but only a cousin) is not a registered document and that curiously enough the alleged signature of Purnima on this document purports to have been written by Sashi Bhusan Ojha himself. On the other hand it has been urged that Sashi Bhusan Ojha should have been examined on behalf of Purnima to deny that he had appeared before the settlement officer and made the admission which is attributed to him. However that may be, it is clear that the admission in question was not made by Purnima directly but is said to have been made by her through another person and it has not been proved that this other person, whoever he may be, had really been authorized by Purnima to make any admission on her behalf. Besides, it appears that Nandlal had by this time succeeded in winning over Purnima to his side with the result that Purnima began to live in Nandlal's house and Amodebala, the daughter of Ramlal (whose husband Kali Kinker Misser had died while the survey operation was going on), was left alone to carry on the struggle with Nandlal.

In this fight Nandlal was decidedly in a position of some advantage because he could successfully urge, and on certain occasions did urge, that during the life-time of Purnima, Amodebala had no interest in the properties of Ramlal even on the assumption that Nandlal and Ramlal had separated. It appears however that Amodebala also had some influence over the tenants because we find that on 28th September 1922, Nandlal was forced to bring a rent suit against certain tenants of Sirkabad—Alai Mahta and others for the recovery of Rs. 48 on the allegation that though the defendants had delivered to him his share of the paddy, they had removed the entire straw. The suit was contested by defendant 1 who pleaded that he held the land under Umamayi and afterwards under her daughter Amodebala and he also contended that the suit could not proceed in the absence of Amodebala and Purnima. Both Amodebala and Purnima were accordingly made parties to the suit but the suit was contested mainly by Alai Mahta and Amodebala. The suit was finally dismissed on the ground that the kabuliyat of 1918 which had been executed in Nandlal's favour shortly after the death of Umamayi was a collusive document. Nandlal appealed from this decision to the Deputy Commissioner of Manbhum, but

his appeal also was dismissed on 15th February 1923. Meanwhile Nandlal brought a suit (Suit No. 48 of 1923) against Purnima for a declaration that Tilai and Jerka properties belonged to him, that the defendant had no right to the said properties and that the Record of Rights had been incorrectly prepared. This suit was instituted on 13th March 1923, and was decreed on 31st May 1923. As the circumstances under which the decree was obtained have to be investigated in this appeal, it is sufficient to say that the decree purports to have been passed on the admission of Purnima as contained in her deposition which was recorded by a Commissioner Babu Pashupati Mukherji. In the same year Nandlal Ojha once more instituted a rent suit against Alai Mahta for the recovery of produce rent for the years 1328 and 1329 in respect of the land held by him in Sirkabad. Alai Mahta again challenged the title of Nandlal and pleaded having made a bona fide payment of rent to Amodebala, and the latter was therefore impleaded as a pro forma defendant. This suit also was dismissed with costs and the decision of the trial Court was upheld on appeal by the Judicial Commissioner of Manbhum, the judgment of the appellate Court being delivered on 16th January 1925. On 6th January 1926, Nandlal instituted Suit No. 3 of 1926 (out of which appeal No. 142 arises) upon the allegation that Ramlal Ojha had died in a state of jointness with him; that neither his two widows nor Amodebala could therefore inherit his property and that defendants 2, 3 and 4 (against whom the two rent suits had been unsuccessfully brought by Nandlal) were liable to pay rent to him and not to any other person. The reliefs that he prayed for in his plaint were as follows:

"(a) That it may be declared that the plaintiff has got panchak brahmottar right, mentioned in plaint to the land specified in Sch. 3 and that defendant 1 has no right whatever thereto.

(b) That after declaring plaintiffs' right to get bhag paddy from defendant 2 in respect of land in the possession of Alai Mahta within the land, covered by Sch. 3, a decree for khas possession thereof may be passed in favour of the plaintiff.

(c) That if defendant 1 has realized bhag paddy for the years 1330, 1331 and 1332 B. S. from defendant 2, a decree for Rs. 201 (two hundred one) on account of the price of the said paddy may be passed against her.

(d) And that costs in Court and interest may also be awarded."

Written statements were filed in this

suit by all the defendants, defendants 3 and 4 admitting the claims of the plaintiff and the other defendants contesting it. The main ground on which the suit was contested by Purnima and Amodebala was that Ramlal had separated during his lifetime from Nandlal and that therefore Nandlal was not entitled to any property by way of survivorship. It was further contended that the matter was res judicata in view of the decision in Small Cause Suit No. 215 of 1908 and there was also a plea of limitation raised. Alai Mahta, defendant 2, alleged that the kabuliyat of 1918 was collusive, inoperative and invalid and had been obtained by Nandlal in order to create evidence on his behalf and that the decision in the previous suit as to the collusive nature of the kabuliyat was binding on the plaintiff. It was also alleged by him that he and his brothers formerly held their land under Ramlal Ojha and subsequently under Umamayi and then under defendant 1 Amodebala. In May 1929, Purnima brought Suit No. 50 of 1926 (which is the subject-matter of appeal No. 142) for setting aside the decree obtained in Suit No. 48 of 1923 on the ground of fraud. Her main allegations have been set forth in paras. 8, 9 and 10 of the plaint and were in substance these: (1) that she had no knowledge of the suit; (2) that she had not appointed Babu Brajendra Nath Muzumdar (the pleader who acted for her in the suit) as her pleader; (3) that she never authorized him to ask for commission or to take the other steps which were taken in the suit; (4) that the deposition recorded by the Commissioner did not represent her statement, nor had she made a voluntary statement before him; and that in fact she had been made to say "yes" or "no" to every question put to her; (5) that the defendant instead of disclosing the real facts before the Court had suppressed them and obtained the decree by practising fraud upon the Court.

The defence of Nandlal on the other hand was that he had not practised any fraud upon the Court and that the decree obtained by him was binding upon Purnima. Upon these allegations a number of issues were framed in both suits and by consent of the parties the two suits were tried together.

Two main questions arose at the trial: (1) whether Ramlal had separated in estate from Nandlal during his lifetime;

and (2) whether the decree in Suit No. 48 of 1923 was vitiated by fraud. It need not be stated that issue 1 was considered to be the most material issue so far as Suit No. 3 of 1926 was concerned, while the second was the chief issue in Suit No. 50. The learned Subordinate Judge held that Nandlal was entitled to the declaration prayed for by him in his plaint as he was of opinion that Ramlal had died in a state of jointness with him. With regard to Jerka property however he found that it was the self-acquired property of Ramlal and therefore Nandlal had no valid claim to it. In Suit No. 50 he held that the decree obtained by Nandlal was vitiated by fraud; but in view of his finding that Nandlal was entitled to all the properties excepting Jerka, he vacated the decree only with regard to Jerka.

From this decision two appeals have been preferred, one by Amodebala and Purnima and another by Purnima alone. In Appeal No. 141, which arises out of Suit No. 50, the grievance of the appellant is that when the decree was found to have been vitiated by fraud, it should have been vacated in its entirety, whereas the main question raised in Appeal No. 142, which arises out of Suit No. 3, is that it should have been held that Ramlal had been separate from Nandlal and that the suit of Nandlal should have been dismissed on certain legal grounds. The cross-objection of Nandlal in Appeal No. 141 relates to the finding that the decree in Suit No. 48 had been procured by fraud, whereas his cross-objection in the other appeal relates to the finding as to Jerka being the self-acquired property of Ramlal.

Both the appeals and the cross-objections have been argued at great length in this Court and the arguments were mainly directed to the two important questions in the case to which I have already referred.

I shall first take up the question as to whether Ramlal died in a state of jointness or separation with Nandlal because that was the first question argued before us although logically the second question, namely, whether the decree in Suit No. 48 was obtained by fraud, should have been dealt with first.

The learned advocate for the appellant in discussing this question has referred us

to a large number of documents but before dealing with them in detail I would like to dispose of two preliminary points raised in course of the argument. It was said in the first place that the decree in the Small Cause Court suit of 1908 in which the identical question had been raised by the parties and decided by the arbitrators operates as *res judicata*. It is conceded that the Small Cause Court which tried the previous suit was not competent to try the present suit and therefore one of the conditions laid down by S. 11, Civil P. C., is not satisfied. It was however urged that what we have to look to is whether the arbitrators who gave the award were or were not competent to try the present suit and as there is no limit to the jurisdiction of the arbitrators, the award given by them would operate as *res judicata*. In support of his argument the learned advocate for the appellant relied upon *Bhajahari Saha Banikya v. Behari Lal Basu* (1) and *Krishna Panda v. Balaram Panda* (2). Neither of these cases however appears to me to help the appellant.

In *Bhajahari's* case (1) Mookerjee, J., simply pointed out that certain rights may be created under an award even though it has not been enforced either by an application under S. 525, Civil P. C., or by a regular suit. Similarly in the case decided by the Madras High Court although both parties having objected to the award, it had never been carried into effect, it was held in a subsequent suit for partition that such an award was equivalent to a final judgment and was binding on the parties in the absence of positive evidence that both parties had agreed that the former state of things should be restored. It is not disputed here that the award was final so far as the claim in the Small Cause Court suit is concerned; but it does not follow that the award by itself will have any greater value than the decree of the Court which is based upon the award. If therefore a decree passed on contest in the Small Cause Court suit could not operate as *res judicata*, I do not see how a decree based upon an award in the same suit or the award itself, if it is possible to treat it as something apart from the decree, can operate to make any matters decided thereby *res judicata*.

(1) [1906] 33 Cal. 881=4 C. L. J. 162.

(2) [1896] 19 Mad. 290.

The next point urged was that the decisions in the Small Cause Court suit as well as in certain other proceedings which followed it including the proceedings before the settlement officers, even though they might not operate as *res judicata*, should be treated as evidence in the case, and some stress was laid on the fact that the learned Subordinate Judge had in the face of so many decisions, come to a finding that the two cousins were joint at the time of Ramlal's death.

Here again, I am afraid the learned advocate for the appellant is attempting to place his case too high. The question as to whether a certain judgment pronounced in another case is or is not relevant is to be governed by Ss. 40 to 42, Evidence Act. It is conceded that these judgments would not come under Ss. 40 to 42 and S. 43 clearly provides that such judgments as are not relevant under these sections are irrelevant unless the existence of such judgment is a fact in issue or is relevant under some other provisions of this Act. The question as to whether there are any other provisions in the Act which would make such judgments relevant has been debated in a series of cases in this country. In *Gujja Lal v. Fatteh Lall* (3), it was held by the Full Bench of the Calcutta High Court, Mitter, J., dissenting, that a former judgment which is not a judgment in rem, nor one relating to matters of public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as proof of the particular point which is decided, unless between the same parties or those claiming under them. A question arose in this case whether such a judgment was admissible under S. 13, Evidence Act, and Garth, C.J., expressed an opinion that the former judgment was not a transaction and that the right claimed in the particular suit was not a right within the meaning of S. 13. On the other hand, in *Collector of Gorakhpur v. Palakdhari Singh* (4) a Full Bench of the Allahabad High Court came to a different conclusion and held (Bradhurst, J. dissenting) that such judgments were in many cases admissible under S. 13. The view that was put forward in this case was that the majority of the learned Judges of the Calcutta High Court had

put too narrow a construction on the word "right" as used in S. 13 and that the term "right" includes not only incorporeal rights, but a right of ownership. It was further held that though the judgment itself was not a transaction, the suit or the litigation in which it was pronounced might be treated as a transaction or an instance in which a right may have been asserted, acknowledged or denied. The point has been considered so exhaustively in these two judgments that I do not think it is necessary for me to deal with it at any great length. It appears however that although in many cases the Judges have expressed the view that the decree if not conclusive evidence is not evidence at all: see *Mahendra Lal Khan v. Rosomoyi Dasi* (5), *Surendra Nath Pal v. Brojo Nath Pal* (6), *Krishnaswami Ayyangar v. Rajagopala Ayyangar* (7), *Ramaswami v. Apparv* (8), *Subramanyan v. Paramaswaran* (9), there are, on the other hand, a large number of cases where the Courts have shown their inclination towards the view propounded by Mitter, J., in *Gujja Lal v. Fatteh Lall* (3). In *Abinash Chandra Chatterjee v. Paresh Nath Ghose* (10), Ghose, J., observed:

"I am disposed to hold that the Judicial Committee in *Ram Ranjan v. Ram Narain Singh* (11) and *Bitto Kuar v. Kesho Prashad Missir* (12), rather adopted the views expressed by Mitter, J., in *Gujja Lal v. Fatteh Lall* (3), wherein the learned Judge held that a judgment though not *inter partes* may be received in evidence under S. 11 or S. 13, Evidence Act."

See also *Tepu Khan v. Rajani Mohan Das* (13), *Lakshman Govind v. Amrit Gopal* (14), *Dharnidhar v. Dhundiraj Ganesh* (15), *Mahamad Amin v. Hasan* (16), *Thama v. Kondan* (17) (here the judgment was held to be admissible to prove the result of an admission). It appears that in certain special circumstances the Judicial Committee also has not questioned the admissibility of such

(3) [1881] 6 Cal. 171=6 C. L. R. 439 (F.B.).

(4) [1889] 12 All. 1 (F.B.).

(5) [1885] 12 Cal. 207.

(6) [1886] 13 Cal. 352 (F.B.).

(7) [1895] 18 Mad. 73.

(8) [1889] 12 Mad. 9.

(9) [1888] 11 Mad. 116.

(10) [1905] 9 C. W. N. 402.

(11) [1895] 22 Cal. 533=22 I. A. 60=6 Sar. 530 (P.C.).

(12) [1897] 19 All. 277=24 I. A. 10=7 Sar. 131 (P.C.).

(13) [1898] 25 Cal. 522=2 C. W. N. 501.

(14) [1900] 24 Bom. 591=2 Bom. L. R. 420.

(15) [1903] 5 Bom. L. R. 230.

(16) [1907] 31 Bom. 143=9 Bom. L. R. 65.

(17) [1892] 15 Mad. 278.

judgments. In *Run Bahadur Singh v. Lucho Koer* (18) Sir R. P. Collier observed:

"Although the judgment in the rent suit is not conclusive still their Lordships cannot help attaching some weight to the decision of the Munsif and the Subordinate Judge, both natives, who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgment in the certificate suit in which the plaintiff set up the same case was the same; it was the same, also, and the case and evidence much the same, in proceeding before a Magistrate requiring the plaintiff to enter into recognizance to keep the peace. All the native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgment upon it."

Similarly in *Bitto Kuer v. Kesho Prasad Missir* (12) it was held that a prior judgment was admissible though not conclusive evidence in the case. In one case [*Midnapur Zamindari Co., Ltd. v. Naresch Narayan Roy* (19)] it was observed that a previous decision was entitled to some weight as the facts of the case were nearer to the ken of the Court which decided it: see also *Ram Ranjan v. Ram Narain Singh* (11) and *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (20).

In some cases again a distinction has been made between a judgment which is inter partes and one which is not so, a distinction which has not been lost sight of even in *Gujja Lal v. Fatteh Lall* (3) and sometimes it has also been emphasized that although a judgment given in a different case will not be generally admissible under the English law, it should not be supposed that the Indian Evidence Act is a mere servile copy of the English law. Apart however from the case law on the subject, it appears to me that the Evidence Act itself does not draw a distinction between a judgment which is not inter partes and a judgment which is inter partes except where the judgment is clearly res judicata. The logical view, therefore seems to me to be that unless a judgment is relevant under Ss. 40 to 42, Evidence Act, it is not evidence at all so far as regards the matter which it decides. It is true that S. 43 provides that a judgment other than that mentioned in Ss. 40 to 42 though otherwise inadmissible may be admissible if it is relevant under some other provisions of this Act. Also in

view of the numerous decisions of the various High Courts in this country as well as the decision of the Privy Council in *Dinomi Chowdhurani v. Brojo Mohini Chowdhurani* (20), it is now, in my opinion, too late to say that a litigation or a suit is not a transaction and that the word "right" as used in S. 13 must be interpreted in the somewhat narrow sense in which it was construed in *Gujja Lal v. Fatteh Lall* (3). Taking this view as I do I am inclined to think that a judgment other than a judgment referred to in Ss. 40 to 42 may be admissible to prove that a right was asserted or denied under S. 13, Evidence Act or to explain or introduce facts in issues or to explain the history of the case. In some cases it has also been held that it may be used to prove an admission made by the ancestor of one of the parties (though the decisions on this point are not unanimous) or to show how certain property was dealt with in the past.

I must confess however that I have not been able to discover any provision in the Evidence Act which would warrant the view that the actual decision or the findings arrived at in a previous judgment can be used as evidence to decide the points which are in issue in a particular case. Such a decision may by virtue of specific provisions operate as res judicata or be relevant as a pronouncement on matters of public nature, but otherwise it is not better than a mere opinion expressed on the issues involved in a particular case and the Evidence Act is clear that "opinion" will be relevant in those cases only which are specifically referred to in the Act and in no others. I am of opinion therefore that although, as observed by Sargent, C. J., in *Ranchhodas Krishnadas v. Bapu Narhar* (21) one might have wished that the door had been opened somewhat wider for this class of evidence yet under the law as it stands the actual decision or the findings arrived at in a judgment pronounced in a different case are inadmissible except in cases referred to under Ss. 40 to 42, Evidence Act and except perhaps in the special type of cases which have been referred to by the Judicial Committee. This being my view, although I would not go so far as to hold that the judgments which are on the record of the present case were inadmissible, I would proceed to decide this

(18) [1885] 11 Cal. 301=12 I. A. 23=4 Sar. 602 (P.C.).

(19) A.I.R. 1922 P.C. 241=64 I. C. 231=48 I. A. 49=48 Cal. 460 (P.C.).

(20) [1902] 29 Cal. 187=29 I. A. 24=8 Sar. 224 (P.C.).

(21) [1886] 10 Bom. 430.

case not upon the findings which have been arrived at in favour of the appellant in those judgments, but upon the other evidence adduced in the case.

Now, the most important evidence in this case is an old document, Ex. M of Baisak 1295, corresponding to April 1888. It purports to be a receipt given by Nandlal Ojha to Ramlal Ojha and runs thus:

"This receipt is executed to the following effect: That your father the late Biswanath Ojha and my father the late Shrinath Ojha were two brothers, of whom you are the son of the eldest and I am the son of the youngest. I lost my mother while I was a child. Your mother has brought up both the brothers. We both the brothers having proposed to separate from each other in mess, we appointed Raghmani Adhikari, Mukhtear of Purulia Court, and Fachu Malla of Raghunathdih, parganna Kansaipur and Muchiram Mahata of Keraya and Goor Dutta of Ghatbera and 16-annas tenants of the village, as panchayet; and we having agreed to the partition and division made by them, we receive in our respective shares moveables and immovables, articles, etc., as per schedule herein below. Hence, after having received all (?) the things detailed in the schedule, I execute this receipt in your favour for the purpose of a memorandum."

Then follows a schedule in which a list of properties allotted to the two cousins is given and then appear the signatures of certain persons. We have examined this document carefully and in my opinion there can be no question as to its genuineness. It has been proved to be in the handwriting of one Raghmani Mukhtar who, even Nandlal admits, used to act as his mukhtar in the old days and who has been long dead. It appears to have been filed in the suit of 1908 and the admission made in the plaint of Nandlal that he separated in mess and began to cultivate some lands separately in the year 1295 also goes to support its genuineness. The question however is whether this document proves that there was an effective severance of joint estate in the year 1295. The learned advocate for the respondent tries to show that there was only a separation in mess then and the only reason for the separation was that Nandlal was asked to cook food even after Ramlal had married a wife. It is urged by him that a mere separation in mess which was induced by an ordinary quarrel like this could not be regarded as sufficient to cause a disruption of the joint family. Stress is also laid upon the words :

"we both the brothers having proposed to separate from each other in mess"

and it is argued that this clearly indicates that the intention was to separate in mess

only. The learned advocate for the appellant on the other hand contends that the document should be read as a whole and that the Bengali expression which has been translated as meaning "separation in mess" does not really carry that meaning but means in ordinary parlance an effective partition. As this view is not accepted on behalf of the respondent I shall proceed on the assumption that the document has been correctly translated, though I agree with the learned counsel for the appellant that it will be most unsafe to isolate any particular passage in the document from its context for the purpose of discovering what the intention of the parties was when this document was written. We must also bear in mind that this document does not claim or purport to be a complete and self-contained formal agreement entered into between parties but merely evidences to some extent what actually happened and should therefore be considered along with the evidence as to the surrounding circumstances and other matters. We have therefore to examine not only the language of this document but also the schedule which is an integral part of it and also consider the extent and kind of properties partitioned and those left undivided. As to the recital in the document itself it is true that it is said in one place that the cousins had proposed to separate in mess, yet in the very next sentence it is made clear that they had also agreed to the partition and division made by the panches. It is significant that the writer had not only used the words "partition" and "division" here, but also referred to "their respective shares in moveable and immovable articles as given in the schedule."

It is needless to emphasize that a mere agreement to hold separate properties for the sake of convenience is quite different from getting one's share in the joint property by means of a division or partition and that the latter was the case is fully confirmed by a careful perusal of the schedule attached to this document. It is fully established by evidence that the parties divided on this occasion all their moveables and nij-jote lands and on this point there has been no serious controversy. (After discussing evidence, his Lordship observed as follows): It is also to be noted that after 1895 the Jerka property was acquired in the name of Ramlal alone and even the learned Subordinate Judge had to hold on

the evidence before him that this was the self-acquired property of Ramlal. I have already stated that this property was acquired during the lifetime of Ramlal by three documents and Nandlal states that he was present on all the occasions on which the consideration was paid to the former proprietor of Jerka. It is curious however that although in every other document, which related to the property which was admittedly common, both Ramlal and Nandlal joined, the Jerka properties were allowed to be acquired only in the name of Ramlal. It is true that such a transaction is possible even in a joint family; and where the family is joint, the mere fact that a certain property has been acquired in the name of one of the members only, does not necessarily make it the sole property of that particular member. In this particular case however it has been proved by D. W. 1, and his statement is supported by Ex. D-1, that about the year 1304 Fasli or 1897 there was a criminal case between Ramlal and Nandlal in which the complaint was that one of these persons had encroached upon the land of the other. It is therefore a matter to be considered as to whether in such circumstances Nandlal who was elder than Ramlal would allow the acquisition to be made in the name of Ramlal only. Again what we find is that in 1909 the very proprietor of Jerka who had executed the three previous documents in favour of Ramlal executed a fourth document in favour of Umamayi, the widow of Ramlal, and not Nandlal. I do not suggest that any of these matters taken by itself is conclusive; but one will have to take into consideration the cumulative effect of all these transactions. The criminal case to which I have referred has not only an important bearing on the question as to whether the Jerka property was acquired by Ramlal for himself alone or for himself and Nandlal but also on the general question as to whether Ramlal and Nandlal were joint at the time when this case was instituted. It is needless to say that it is not usual to find one member of a joint family bringing a case of trespass against another in respect of property which is still in law joint but which is held in separate possession only for the convenience of enjoyment by individual members of the joint family.

A joint Hindu family again has certain peculiar features of its own; but the evidence in this case, so far as it goes, dis-

closes that those features are singularly wanting in this case. Generally one would expect a karta or a manager in the family and some sort of a joint fund or family chest or till as it is sometimes called which is drawn upon on such occasions as the marriage of a daughter or a member of the joint family or the *sradh* of a deceased member. In this particular case Nandlal was admittedly the elder member and it is stated in para. 1 of his written statement in Suit No. 50 of 1925 that:

"When the defendant and Ramlal Ojha were members of one family and joint in mess they all lived under the care of Rashmoin Ojhain, mother of Ramlal. The property described in Sch. 3 of the plaint was acquired at the time out of the income of the joint property and the defendant formerly as karta of the joint family and thereafter alone is in possession thereof."

Here there is a clear suggestion that Nandlal was the karta of the family after the death of Rashmoin and was the sole owner of Jerka after the death of Ramlal. The case about Nandlal being a karta seems to have been abandoned at the trial and in evidence an attempt was made to suggest that Ramlal being the more intelligent of the two cousins was entrusted with the collection of the joint property though it is not expressly stated as to who was the karta. However that be, there is nothing in the whole of the evidence before us to show that Nandlal took any part in marrying the daughter of Ramlal or that Ramlal took any part in Nandlal's domestic affairs. On the other hand, in his own plaint Nandlal accuses Ramlal Ojha of having married his daughter in *saprabara sagotra* and adds that for that reason he (Ramlal) gave up connexion with the said daughter and

"for fear of being outcasted, he never brought her in his own house."

Again in his evidence he referred to his own concubine and the daughter begotten by her and adds that:

"Ramlal was alive when Nagendra was married Ramlal did not participate in the marriage."

It is true that merely because a member of the family did not participate in the marriage of a natural daughter, it does not follow that he was not a member of the joint family; but this passage as well as the passage in the plaint to which I have referred would give some indication of the relations between the two cousins as well as the condition of the so-called joint family. (After discussing the evidence, his Lordship observed): The evidence in

the case, in my opinion, does not show by any means that Nandlal was either joint with Ramlal or was ever in exclusive possession of the properties in Tilai, Jerka and Sirkabad or any of them in its entirety after the death of Ramlal.

Once the facts are fully ascertained there cannot be much difficulty in my opinion in applying the law. The learned Subordinate Judge has reviewed a series of authorities in his judgment and a number of cases have also been cited in the course of the elaborate arguments advanced in this Court. It appears to me however that the learned Subordinate Judge was too much obsessed with the case law on the subject and that he has not correctly appreciated the facts of the case. There is no doubt that the summary of the law given in his judgment cannot be found fault with, but the case law cannot provide us with a ready-made formula and each case has to be judged on its own facts. It may well be that certain circumstances when taken individually do not furnish conclusive evidence of separation, yet they may point to a different conclusion when taken collectively or with reference to the particular facts of any individual case. It is to be remembered that separation in status is not quite the same thing as "partition" as used in common parlance. It is possible for the members of a joint family to sever themselves in estate without there being a formal partition or an actual division of the properties by metes and bounds. In law a severance of the joint estate is effected as soon as an intention to this effect has been clearly and unequivocally expressed. It is also to be remembered that although it has been emphasized in many cases that a declaration of the intention to separate must be made in definite and unambiguous terms, it does not follow that where there is no evidence of an express declaration of intention, separation cannot be proved. The question is really one of intention and all that the law requires is that the intention should be clearly and unequivocally expressed whether it be by explicit declaration or by conduct : see *Makund Dharman Bhoir v. Balkrishna Padmanji* (22).

Thus in the absence of an explicit declaration, the evidence of conduct as well as of the surrounding circumstances is

material for the purpose of judging whether the members intended to separate or not. In this connexion the Courts have always pointed out that mere cesser of commensality or separate enjoyment of distinct portions of the properties or separate definement of shares in revenue or survey paper or mere proof of separate transactions entered into by the coparceners with strangers will not be conclusive to prove separation in estate. It does not however necessarily follow that even though all these elements may be present in a case and no matter what special significance any of these various circumstances may have having regard to the facts of a particular case, they can under no circumstances be sufficient to prove separation. Even as to the cesser of commensality the Privy Council has pointed out that though it may not be conclusive, yet it may properly be considered in determining the question whether there was a partition of the joint family or not: see *Anandi v. Khedu Lal* (23) and *Ganesh Dutt v. Jewach Thakurain* (24). Similarly any one or more of the other circumstances referred to above may have a special significance or bearing on the intention of the parties and therefore decisive in a particular case having regard to its peculiar circumstances though the same circumstances or set of circumstances may not be quite conclusive in another case. In the present case my view is that the separation of 1295 must have caused a serious breach in the union and it was by no means such a trivial or ordinary incident as to have left the joint family wholly unaffected.

What is significant is that the parties did not take for themselves only so much of the properties as would have been sufficient for their maintenance but they divided everything which could be conveniently divided and received their "share" of such properties by what they called "partition and division" brought about through the intervention of certain panches. In *Vaidyanatha Aiyar v. Aiyasamy Aiyar* (25) it was held that when a partial partition is proved or admitted to have taken place, the presumption is that there has been an entire partition both with reference to rights and properties

(23) [1872] 14 M.I.A. 412=18 W.R. 69 (P.C.).

(24) [1904] 31 Cal. 262=31 I.A. 10=8 Sar. 575 (P.C.).

(25) [1909] 32 Mad. 191=1 I.C. 408.

(22) A.I.R. 1927 P.C. 224=105 I.C. 703=54 I.A. 413=52 Bom. 8 (P.C.).

and this view was reaffirmed in *Sundaramma v. Kamakotiah* (26) and in *Subha Hiddi v. Alagammal* (27). I have already discussed the matter at some length before and all I need say here is that even apart from this presumption the conclusion which I have arrived at on a consideration of the oral as well as the documentary evidence produced in the case is that Ramlal and Nandlal separated in estate in the year 1295 and that Nandlal was not therefore entitled to succeed to any of the properties in dispute. The learned Subordinate Judge relying on an isolated passage in the evidence of D. W. 2 has held that so long as Rashmoni Debi lived she managed the properties and her orders were carried out; but when I refer to this passage in the evidence of this witness I do not find anything in it to show that the witness was referring to the common property of Nandlal and Ramlal and not to the separate property of Ramlal, having already said in the examination-in-chief that the two cousins had separated.

I shall now pass on to consider the next important point in the case that is to say, whether the decree in Suit No. 48 of 1923 was obtained by fraud. The circumstances under which this suit was brought were no doubt peculiar. It is not disputed that at the time when the suit was brought Purnima was living with Nandlal and that there was no quarrel or friction whatsoever between her and the latter. It appears strange therefore that it should have been considered necessary to bring a suit against her in the absence of any dispute. This matter by itself would not perhaps have had much significance if it had stood alone; but there are many other suspicious features in the case. (After dealing with the evidence, his Lordship proceeded). Now the main question in this case is whether Purnima has established a case of fraud. It is said that although there may be suspicious features about the case, yet that is not enough so long as definite particulars of fraud are not set forth and they are not established beyond doubt. As to the particulars of fraud I have already said that the case of Purnima in substance was that the decree had been obtained by keeping her in ignorance of the suit, by representing to the Court that Babu Bra-

jendra Nath was her pleader although as a matter of fact he was not, by taking various steps in the suit on her behalf although she had never authorized those steps to be taken and by using before the Court a deposition which did not contain her full and free statement. All these allegations are fully supported by her in her evidence and the question is whether her evidence should be taken to be sufficient in this case. The learned Subordinate Judge before whom she gave her evidence has apparently believed her and in my opinion he has rightly done so. The circumstances of the case to which I have referred fully lend support to her statements and there seems to be no reason why they should be rejected. It is true that her statements are to be taken with caution and in one or two instances, for example, where she says that her thumb-impression had been obtained not on the record of deposition but on a blank piece of paper it may not be safe to accept her statement; but the statements in other respects, specially where they are fully supported by the probabilities and the circumstances of the case, seem to have been accepted by the learned Subordinate Judge and I see no reason to differ from his conclusions.

I cannot disbelieve her evidence that Brajendra Babu was never appointed by her; that she never authorised him to say to the Court that no written statement was necessary or that she was to be examined on commission. This fact by itself would be a serious fraud upon the Court, because if it is believed it means that the decree was obtained by setting up a person as a pleader for the party where as a matter of fact he had no authority to act as such. I am also of opinion that her statement as to her being wholly ignorant of the suit and as to the manner in which the deposition had been recorded cannot also be easily discarded. These facts in my opinion are quite sufficient for the purpose of upholding the decree of the lower Court independently of the argument advanced on behalf of the appellant on the score of her being a pardanashin lady and not having had any free and independent advice at any stage of the suit. In my opinion this question could directly arise only if there was a contract or an agreement entered into by the lady which was sought to be impugned or if the decree passed in this case had been a com-

(26) [1915] 26 I.C. 514.

(27) [1915] 31 I.C. 674.

promise decree. The learned advocate for the appellant however refers to the evidence of Nandlal in which he speaks of the decree as if it was one based on a compromise. He says :

"After the compromise Purnima went to her father's house"

and then again :

"He (Brajendra Babu) appeared for me in my case with Urma and Debi I cannot say whether it was before or after the compromise in Suit No. 48."

The learned advocate for the appellant thus refers us to the case of *Nistarini Dassi v. Nundolal Bose* (28), where Stanley, J., after referring to the fact that the plaintiff there was a pardanashin lady living with the defendant Nundolal Bose who had exercised considerable influence over her and that while she was living under his care, he had induced her to put her name to documents which were not explained to her, referred to the following passage of Phear, J. in *Kanailal Jawhari v. Kamini Debi* (29) :

"I may remark that I have more than once felt myself obliged to hold that a Hindu pardanashin is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shown. It is therefore in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable. The most usual mode of discharging this onus is to show that the lady had good and independent advice in the matter, and acted therein altogether at arm's length from the other contracting party."

As I have however already indicated although the youth of the lady and her being a pardanashin Hindu widow and her living with Nandlal at the time the decree was obtained may be circumstances tending to show that she could be easily imposed upon, I do not think that the principle laid down in the decision relied on by the learned advocate exactly applies to this case because this is not a case in which Purnima was strictly speaking a contracting party and a case of undue influence is not quite the same as a case of fraud. In my opinion however the case of fraud has been fully established and her suit has been rightly decreed.

The only thing which I cannot understand is why the learned Subordinate Judge having found that the decree had

been obtained by fraud should have partially decreed the suit only with regard to Jerka property. In my opinion Appeal No. 141 should be allowed with costs and Suit No. 50 of 1926 should be decreed. As to Suit No. 3 as I have held that Ramlal had separated from Nandlal during his lifetime, the plaintiff has failed to establish his title upon which his suit is based and therefore his suit must necessarily fail.

It may be mentioned that it was urged on behalf of the respondent that Suit No. 3 was purely one under S. 177, Chota Nagpur Tenancy Act, and the question as to whether Ramlal and Nandlal were joint or separate need not be gone into. On the other hand it was urged on behalf of the respondent that if the plaintiff's suit was one under S. 177 it was barred by limitation because it was brought more than one year after the decision of the rent Suit No. 1,400 of 1921-22. In my opinion however on the plaint as framed it cannot be held either that the question of title cannot be gone into or that the suit is wholly barred by limitation.

The result is that Suit No. 3 of 1926 must be dismissed and Appeals Nos. 141 and 142 must be allowed with costs throughout. The cross-objections in both the cases will be dismissed.

Wort, J.—I agree.

K N./R.K.

Appeals allowed.

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A. I. R. 1932 Patna 117

DHAVLE AND MACPHERSON, JJ.

Chitrarekha Dai—Appellant.

v.

Bansman Rai—Respondent.

Appeal No. 248 of 1929, Decided on 22nd April 1931, from order of Dist. Judge, Purnea, D/- 12th June 1929.

Succession Act (1925), S. 384 — No appeal lies on order dealing with furnishing of security.

Where a succession certificate is granted to a person on his furnishing security, no appeal lies against that part of the order which deals with the furnishing of security : 13 *All.* 214 ; 26 *All.* 173 ; 2 *A. L. J.* 606 ; 5 *M. L. J.* 28 ; 20 *Mad.* 442 ; 25 *Cal.* 320 ; 19 *Bom.* 790 ; 36 *Bom.* 272 and 3 *All.* 304, *Ref.* [P 119 C 1, 2]

L. K. Jha and *P. Jha*—for Appellant.
R. Chowdhury—for Respondent.

Dhavle, J.—This is an appeal from an order of the District Judge of Purnea

(28) [1899] 26 Cal. 891=3 C.W.N. 670.

(29) [1867] 1 B.L.R. O.C. 31 (note).

directing that the appellant Srimati Chitrarekha Dai, who had applied to him for a succession certificate, do get the certificate on furnishing security to the extent of the amount for which the certificate would be taken. Chitrarekha had applied for a succession certificate in respect of Rs. 8,739-2-6 being the total of a Savings Bank account and a deposit in the Imperial Bank of India and nine bonds and one decree, left by her deceased father, Babu Udit Nath Ray. She claimed that her father not having left any widow or son surviving him, she was entitled to a succession certificate as the only daughter of her father. The application was opposed by one Bansman Ray claiming to be the nephew of the deceased and to have been adopted by him as karta putra and saying that as legal heir of the deceased he had filed an application for letters of administration to the estate of Udit Nath. When the application of Chitrarekha came on for hearing on 12th June 1929, Bansman did not appear and the learned District Judge heard one witness for the applicant, held that she was the daughter and only heir of the deceased and directed that she was to get the certificate but that as she had only a life interest in the assets and as there was a case for grant of letters of administration pending, it was necessary to take an indemnity bond from her, ordering accordingly that she get a succession certificate on furnishing security to the extent of Rs. 20,000. The next day Chitrarekha applied to the District Judge for a reconsideration of the order as to the amount of the security and asked that it be reduced.

On 15th June 1929 a compromise petition was put in signed by Chitrarekha on one hand and by Bansman and his brother Bankhandi on the other. In this application it was stated that Bansman had given up his claim as karta putra and that it was agreed between the parties that Bansman was to have Rs. 1,000 with interest thereon and Bankhandi a similar amount out of the assets; that Chitrarekha was to perform the Ekodista Sradh of the deceased at a cost of Rs. 1,000 and repair the Thakurbari and Shivalaya buildings at a cost of Rs. 1,000 and that she was to get the balance, namely, Rs. 4,035 with interest thereon with absolute power of disposal over the same. There was a prayer also that as there was no longer any dispute regarding title between the

parties, Chitrarekha may be exempted from furnishing security under S. 375, Succession Act of 1925. The learned District Judge held that the certificate had been granted under Cl. (3), S. 373 of the Act and that in spite of the compromise it was necessary to take some security, particularly in view of the fact that the petitioner had only a limited interest. He however reduced the amount of the security to the amount for which the certificate was to issue. Against this order Chitrarekha has appealed on three grounds; the first is that no security should have been demanded on the decisions that Chitrarekha was entitled to get a certificate of heirship. The second is that hers is not a limited interest, but that under the Mithila School of Hindu law she has an absolute right to the moveables left by her father. The third is that the District Judge should have held that he decided the matter not under Cl. (3) but under Cl. (2), S. 373 of the Act.

As an alternative to the appeal Chitrarekha has also filed a revisional application in which it is urged that the District Judge has acted illegally and with material irregularity in calling upon her to furnish security although there is no provision for it in S. 373, and that the District Judge should not have called upon her to furnish security to the extent of Rs. 8,739-2-6 but only of Rs. 4,739-2-6 the amount to which she was entitled under the terms of the compromise.

The first question that arises is whether an appeal lies in the case at all. Under S. 384 of the Act, which corresponds to S. 19, Act 7 of 1889, an appeal lies to the High Court from an order of a District Judge "granting, refusing or revoking" a succession certificate. It has however been held in several cases of the Allahabad High Court — *Bhagwani v. Manni Lal* (1), *Nannhu Mal v. Gulabo* (2) and *Gauri Dutt v. Mt. Maikia* (3) — that an order allowing the grant of a succession certificate on condition of security being furnished is an interlocutory order and is not appealable. *Bhagwani's* case (1) was however not followed in two cases in the Madras High Court: *Venkata Sami v. Chinna Narain* (4) and *Ariya*

(1) [1891] 13 All. 214=(1891) A.W.N. 45.

(2) [1903] 26 All. 173=(1903) A.W.N. 225.

(3) [1905] 2 A.L.J. 606.

(4) [1895] 5 M.L.J. 28.

Pillai v. Thangammal (5). It was also not followed in *Radha Rani Dassi v. Brindabun Chundra Basak* (6). And although it was followed in the Bombay High Court in *Bai Deokore v. Lalchand Jivandas* (7), this last decision was explained in *Bai Nandkore v. Maganlal Varajbhukhandas* (8), where it was held that an order granting the certificate upon the applicant furnishing security is appealable in those cases where the question that has been decided is the rights of the respective parties to the grant of a certificate. The question that was agitated in appeal in *Bai Deokore's* case (7), it was pointed out, was the propriety of the order requiring security.

The cases to which I have referred seem (with one or two exceptions from Allahabad which will be presently dealt with) reconcilable on the footing that the party aggrieved by the grant has a right of appeal but not either party aggrieved by the order requiring security. It will be seen at once that the order for the grant of a succession certificate cannot by itself afford a grievance to the party to whom the certificate is to issue, and in the present case the appellant's grievance is not the order of the grant but the order for furnishing security. We have not been referred to any case in which it was held that the party whom I might for the sake of brevity call the grantee is entitled to appeal against the order that security must be furnished before the issue of the certificate. Under Act 27 of 1860 which was replaced by Act 7 of 1889 (the predecessor for present purposes of the Succession Act) it was held that no appeal lay for impugning the order of a District Court requiring security from the person to whom it has granted the certificate: see *In the matter of Srimati Paddo Sundari Dasi* (9). In the case of *Gauri Dutt v. Mt. Maikia* (3), where the appeal was by the party that had resisted the grant, Banerji, J., followed the previous decisions of the Allahabad High Court but Richards, J., who considered the rulings binding upon him, observed that the order which the legislature intended to be appealable was the decision of the Court as to who was or was not the proper person to be granted

the certificate and not the question whether or not that person should furnish security.

The decision in *Bhagwani's* case (1), proceeded entirely on the ground that the order granting the certificate conditionally on the applicant's furnishing security was not an order "granting, refusing or revoking certificate" within the meaning of S. 19 of the Act, but it can also be supported on the ground indicated in *Bai Nandkore's* case (8) in explaining the decision in *Bai Deokore's* case (7); the appellants in *Bhagwani's* case (1) were the persons in whose favour the order for a grant had been made, subject to security being furnished as a condition precedent. The decision in *Nannhu Mal's* case (2) cannot however be so explained for the appellant in that case was the party that had resisted the conditional grant of a certificate to the other side. But the learned Judges Blair and Banerji, JJ., whose attention was drawn to the two cases from Madras and the case of *Radha Rani Dasi v. Brindabun* (6) observed that the learned Judges of the Madras and of the Calcutta Courts had not had their attention called to the dilemma that if such an order was an order granting a certificate on security being furnished, it was also by implication an order refusing a certificate if the security was not furnished and that a bifurcated order of this kind, would, if an appeal lay, be open to appeal by both sides. It seems to me that the dilemma completely disappears if it is held that it is not open to either party to appeal against that part of the order which deals with the furnishing of security. I agree with Richards, J., that the order which the legislature intended to be appealable is not the order regarding the furnishing of security. In my opinion therefore, it is not open to Chitrarekha to appeal on the grounds she has taken, grounds dealing entirely with the question of the security to be furnished by her.

Coming now to the revisional application, the learned District Judge himself says that he dealt with the matter under sub-S. (3), S. 373. That he did so is clear from the fact that he referred among other things to the case that was pending in his Court for the grant of letters of administration. There cannot therefore be any question that under S. 375 of the Act he was not merely em-

(5) [1896] 20 Mad. 442.

(6) [1897] 25 Cal. 320=2 C.W.N. 59.

(7) [1894] 19 Bom. 790.

(8) [1911] 36 Bom. 272=12 I.C. 921.

(9) [1880] 3 All. 304.

powered but even bound to require security. It has been urged that under the Mithila law the daughter has an absolute right to the moveables left by her father, but this ground was not taken even in the applicant's petition of 13th June for a reconsideration of the amount of security. It has also been urged that the compromise gave the petitioner absolute power of disposal over the balance of the assets and that therefore no security should have been taken from her. There is however nothing to prevent other reversioners, if any, from coming forward and assailing the compromise, and even under the compromise there are certain things that the petitioner is required to do. I do not think that in these circumstances the learned District Judge can be said to have acted illegally or with material irregularity in the exercise of his jurisdiction.

I would therefore dismiss both the appeal and the application in revision with costs.

J. N. D.
Macpherson, J.—I agree.

Advocate High Court accordingly.

Jammu & Kashmir

Srinagar

*** A. I. R. 1932 Patna 120**

JWALA PRASAD AND JAMES, JJ.

Abdul Haque and others—Petitioners—Appellants.

v.

Secy. of State and others—Opposite Parties—Respondents.

First Appeal No. 126 of 1928, Decided on 17th November 1931, against decision of Dist. Judge, Saran, D/- 2nd March 1928.

*** Land Acquisition Act (1 of 1894), S. 54—Occupancy holding—Landlord in case of custom, can claim his one-fourth share of compensation money even when land is acquired under the Act.**

Where it is established that the landlords are by local custom entitled to a share of one-fourth of the purchase money on the transfer of an occupancy holding, they are entitled to get their proportionate share out of the compensation money when the holding is compulsorily acquired under the Act.

In the case of a nontransferable occupancy holding, the whole estate in land of which the market value is ascertained consists, first of the occupancy right of the tenant, and secondly of the rights of the landlord. The rights of the landlord, consist of the rent charge and the reversion, included in which is his right to naza-

rana on transfers. The right of the tenant is to occupy the land subject to payment of rent with a limited right of transfer by which he is entitled only to a certain proportion of the market value of the right to possession of the land. If the value of the tenant's property is limited by a reasonable local custom to three-fourths of what would be paid in the open market for the right to possession, it is difficult to see why in an acquisition under the Land Acquisition Act the value of the right should be placed higher, or why the landlord should not receive his customary fee on this transfer, merely because he has not the power of withholding his approval. [P 122 C 1, 2]

If there has been no fixed value for consent of the landlord to the transfer it would have to be ascertained by inquiry as to what he would have expected to have gained in the shape of nazarana for giving his consent. The fact that the acquisition is compulsory does not affect either the market value of the land or the apportionment thereof among the interests owned by different persons : (*Case law referred*). [P 123 C 1]

A. B. Mukherji and U. N. Banerji—for Appellants.

Shiveshwar Dayal — for Respondents.

James, J.—This is an appeal under S. 54, Land Acquisition Act. The land in question, which was in possession of occupancy raiyats at the time of acquisition, consists of 1 bigha 5 kathas of bhit land adjoining the compound of the Munsif's Court at Siwan. On a reference to Court the District Judge valued the land at Rs. 700, allowing Rs. 100 to the proprietors and Rs. 600 to the tenants. The proprietors have appealed from his decision, claiming that the market value of the land is Rs. 3,000 a bigha and that they are entitled to a one-fourth share in the apportionment.

The land adjoins the compound of the Munsif's Court ; and in the immediate vicinity are the local Magistrate's Court, the Dak Bungalow, Post Office, Land Registration Office and other public buildings. It was at the time of acquisition under cultivation with crops standing on it, and the learned District Judge valued it on the assumption that it was agricultural land and not a prospective building site. Mr. Abani Bhusan Mukharji on behalf of the appellants argues in the first place that this land ought to have been treated rather as an eligible building site than as merely agricultural land, lying as it does between the Munsif's Court and the road, and in the immediate neighbourhood of all the principal public offices of the Siwan Subdivision. The learned District Judge has remarked that the land in its existing condi-

tion could not be used as a building site, but this apparently means no more than that the land had not been prepared for building, since he has also observed that the land is upland and indeed, if the land were unsuitable for building purposes, it would not be acquired by Government for the purpose of erecting on it houses for Government officials. The learned District Judge says that a considerable outlay would be required to render the land suitable for the purposes of a building site ; but however smooth a maidan may be, one does not proceed to build a pucca house merely by laying bricks on the top of the soil ; and considerable outlay always is required to convert a site, on which buildings have not hitherto been erected, into the foundations of a proper house. It appears to be clear that in estimating the market value of this land we ought to take into consideration the prices paid for building land or sites of houses in the vicinity in recent years.

Regarding sales of this kind of land or indeed any kind of land in the vicinity, the evidence is meagre. The earliest sale proved on behalf of the appellants is of January 1913, in which one and half kathas of land were sold for Rs. 200 : Ex. 1-b. A house was standing on this land which was also valued at Rs. 200 ; and the learned Government Pleader suggests that the existence of a standing house may be taken to have enhanced the value of the land and that since Rs. 400 was the price of the whole little reliance is to be placed on the apportionment of Rs. 200 as the price of the land. In 1919 6 kathas of land in Siwan town was sold to Sheikh Abdul Huq for Rs. 1,000 : Ex. 1-c. This land also had a house standing on it ; but it was separately valued at Rs. 500. In 1920 Sheikh Muhammad Kasim purchased 1 katha 15 dhurs of land in Siwan town, on which a house was standing, for Rs. 600 of which half is stated as the value of the land and the rest as the value of the house Ex. 1. In 1922 Abdul Huq purchased a house lying on 1 katha 18 dhurs of land in Siwan town for Rs. 1,999-15-0, assigning in the deed Rs. 1,499-15-0 as the price of the house and Rs. 500 as the price of the land. On the other hand sales at lower rates were proved on behalf of the Secretary of State. In 1899 Abdul Rahman purchased 11 bighas 11 kathas of land in Siwan for Rs. 500 (Ex. B) and again in

1916 he purchased 15 kathas 9 dhurs of land for Rs. 700 (Ex. B-4). In 1920 he executed a deed transferring 3 kathas of the land with which we are here concerned to Hafiz and Amanatullah for Rs. 300 (Ex. C). In 1922 Abdul Rahman sold 9 kathas 9 dhurs for Rs. 400 Ex. B-3. In 1925, after the date of the notification in the present case, Mt. Murti sold 5 kathas and 7 dhurs of land close to the land with which we are here concerned for Rs. 400 : Ex. B-5.

It appears from the evidence of Abdul Majid, who is the appellants' manager, that about ten years ago 10 kathas of land close to the land in suit were sold for Rs. 600 for the Bar Library. From these sales which show such varying rates it is not easy to deduce what should be the proper market value. The learned District Judge, treating the land as agricultural or horticultural land, remarks that it is unfortunate that the only instance of the sale of land of this description is the sale of 24th October 1925 made by Mt. Murti (Ex. B-5) ; and he observes that the purchaser in that instance was compelled to pay a high price because he was badly in need of the land. But there does not appear to be any special justification for the assessment by the learned District Judge of the value of this land at Rs. 30 a katha, which is lower than the rate paid in any of the private sales which have been proved except one which took place in 1910. The Bar Library paid Rs. 600 for the acquisition of 10 kathas of land close to this plot. They would probably pay a fair price, but not an extortionate one ; and on the whole it appears to us that Rs. 60 a katha should be taken as representing the market value of this land.

We come now to the question of apportionment. Mr. Abani Bhusan Mukharji suggests that as the landlords are by local custom entitled to a share of one-fourth of the purchase-money on the transfer of an occupancy holding, that proportion of the market value should be treated in this case as the landlords' share. It is suggested by the learned Government Pleader that the landlords failed to prove that they were entitled to such a share of the purchase-money as nazarana on transfers ; but evidence of the custom was given by the landlords' Manager Abdul Majid, which has not been rebutted by any evidence to the con-

trary ; and indeed there is nothing surprising or improbable in the evidence on this point which should lead us to regard it with suspicion. We find that this custom has been proved. The occupancy holding was not transferable without the consent of the landlord; but the position described by the manager may be as adequately expressed by saying that the tenants have a right of transfer to an approved vendee, and that the landlord has a right to one-fourth of the consideration for the transfer. The learned Government Pleader has drawn our attention to the fact that in the executive instructions contained in the Land Acquisition Manual at p. 100 it is remarked that the acquisition of an occupancy holding is not a transaction which requires the landlord's consent, and a landlord is not therefore entitled to receive as compensation one-fourth (or whatever the customary proportion may be) of the amount awarded to the raiyat as compensation for his interest. The instruction there given is that the value of the landlord's reversion, including a prospective transfer fee, is to be assessed on the materials before the officer. It appears to us that this right to receive as premium an exact proportion of the market value of the property is one which ought not to be ignored, when, as in the present case, the custom is found to be reasonable.

The whole estate in land of which the market value is ascertained consists, first, of the occupancy right of the tenant, and secondly of the rights of the landlord. The rights of the landlord, as the learned Government Pleader points out, consist of the rent charge and the reversion, included in which is his right to nazarana on transfers. The right of the tenant is to occupy the land subject to payment of rent with a limited right of transfer by which he is entitled only to three-fourths of the market value of the right to possession of the land. If the value of the tenant's property is limited by a reasonable local custom to three-fourths of what would be paid in the open market for the right to possession, it is difficult to see why in an acquisition under the Land Acquisition Act the value of the right should be placed higher, or why the landlord should not receive his customary fee on this transfer, merely because he has not the power of withholding his approval. No particular reason has been

assigned by the learned District Judge for the manner in which he has apportioned the compensation in the present case, and it would appear to be difficult to find any logical basis for his apportionment. Indeed, if the landlord or tenant is to receive less or more than the amount which he would ordinarily receive in the event of a private sale, conducted in complete good faith on all sides, we are driven to a speculative valuation of the various rights involved in the reversion, which would almost certainly result in the end in an arbitrary apportionment of the value. I consider therefore that as I have said the occupancy right should be held to be worth to the tenant three-fourths of the price which is ordinarily paid for the right to enter into possession of the land, because those are the terms on which he is entitled to transfer.

The rate adopted for the market value in the present case is assumed to be the rate payable for land which after purchase is free of any rent charge. The value of the tenant's interest is therefore to be reduced by the capitalized value of the landlord's rent charge. The capital value of the rent charge, after making allowance for the abatement of Government revenue, may be taken at thirty rupees.

The result is that the award of the learned District Judge must be modified to the following extent:

The landlords will be entitled to Rs. 375 plus a sum of Rs. 30 which represents the value of their rent charge with the usual compensation at 15 per cent. As the tenants have not appealed so much of the award of the District Judge as concerns the compensation to be granted to them stands unaffected by this order.

The appellants have partially succeeded, but their claim was exaggerated and they may bear their own cost in this Court.

Jwala Prasad, J.—I entirely agree both as to the market value of the land and as to the apportionment of the same between the landlord and the tenant.

The latter question is of some importance and I would therefore say a few words in that connexion. The fact that the acquisition is compulsory to my mind has no bearing on the question of apportionment. The market value is ascertained under the statutory provision in the Land Acquisition Act by finding out

what a willing purchaser will pay to a willing seller in respect of the land acquired. The apportionment of the value thus ascertained is to be made according to the value of the interests of the several persons in the land acquired. The holding in question is nontransferable and any transfer thereof without the consent of the landlord would entail an abandonment of the holding under S. 87, Ben. Ten. Act. So the tenant has no right to transfer it without the consent of the landlord, and as such if he chooses to do so without such consent, his interest would fetch no value at all. The landlord has right to receive rent of the land from the tenant and to prevent its transfer by the tenant, and thus he has a right to fix a value for his consent given for any transfer. If there has been no fixed value for consent of the landlord to the transfer it would have to be ascertained by inquiry as to what he would have expected to have gained in the shape of nazarana for giving his consent; but if there is, as in this case, evidence of the fact that the landlord charges 25 per cent. on the consideration money, there is no difficulty in ascertaining the value of his interest in the land and his share in the market value thereof. In the present case it has been established by ex parte evidence which has not been rebutted that the landlord's fee for giving consent has always been 25 per cent. of the market value and the Land Acquisition Deputy Collector, in his order of reference has referred to this fact as well established in the locality. The learned Government Pleader objects to the landlord getting 25 per cent. of the consideration merely upon the ground that the transfer of the holding was compulsory. It is compulsory in the sense that it does not depend upon the will either of the landlord or the tenant, and as it is compulsory additional compensation of 15 per cent. on the market value is paid under the Act; but otherwise the fact that the acquisition is compulsory does not affect either the market value of the land or the apportionment thereof among the interests owned by different persons. The rent of each holding is 15 annas a year and certainly the value of that, at the rate of 20 year's purchase or so, does not truly represent the value of the landlord's interest therein.

Apart from his having certain rights in

reversion, he has in this case (the holding being non-transferable) a definite right of taking nazarana on a transfer made by the tenant. Interests of the landlord in non-occupancy holdings have never been considered to be only a certain per cent of the rent received by him. The principles upon which the landlord's interest in such cases is based, though under different rent laws, are to be found in *F. G. Natesa Ayyar v. Kaja Maruf Sahib* (1), *Rohan Lal v. The Collector of Etah* (2) and *Secy. of State v. Chuni Lal* (3). Two cases of the Calcutta High Court under the Bengal Tenancy Act may also be usefully cited: *Godadhar Das v. Dhunput Singh* (4) and *Nibas Chandra v. Bipin Behary* (5). I therefore agree entirely with my learned brother.

K.N./R.K.

Order accordingly.

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- (1) A. I. R. 1927 Mad. 489=100 I. C. 628=50 Mad. 706.
 (2) A. I. R. 1929 All. 525=117 I. C. 612=51 All. 765.
 (3) A. I. R. 1931 Lah. 207=131 I. C. 364=12 Lah. 117.
 (4) [1881] 7 Cal. 585=9 C. L. R. 227.
 (5) A. I. R. 1926 Cal. 846=96 I. C. 69=53 Cal. 407.
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A. I. R. 1932 Patna 123

MUHAMMAD NOOR AND SCROOPE, JJ.

Parmeshwar Sahu—Appellant.

v.

Nandkishore Lal and *others*—Respondents.

Appeal No. 258 of 1928, Decided on 4th May 1931, against original decree of Sub-Judge, Purnea, D/- 20th September 1928.

(a) Bengal Tenancy Act (1885), S. 167—Certificate in order sheet of Collector that notice under S. 167 was served is prima facie evidence of service in absence of evidence to contrary.

A certificate in the order sheet of the Collector that the notice under S. 167 has properly been served is prima facie evidence that such a notice has been served, but it is not conclusive. It is open to the other party to challenge it and show that the notice was not served in time but in absence of any evidence to the contrary such a notice must be presumed: *A. I. R. 1924 Pat. 515*; 39 *I. C. 943* and *A. I. R. 1928 Pat. 318*, *Foll.*; *A. I. R. 1928 Pat. 459*, *not Foll.*

[P 126 C 1]

(b) Bengal Tenancy Act (1885), S. 167—Notice under S. 167 is to be served in same

manner as summons under Civil Procedure Code.

Under the rules of the Government of Bengal the notice under S. 167 is to be served in a manner provided for service of summons under the Civil Procedure Code. [P 126 C 1]

P. C. Manuk, S. C. Bose and K. M. Moitra—for Appellant.

S. Saran and C. P. Sinha—for Respondents.

Muhammad Noor, J.—This appeal arises out of a suit instituted on 14th November 1927, to enforce a simple mortgage executed on 17th June 1921, by defendant 1 in favour of the plaintiffs-respondents for a sum of Rs. 1,000, the due date being Kartick 1329, corresponding to 15th November 1921. The mortgaged property is 59 bighas and 5 cottahs of land forming part of the occupancy holding of defendant first party. It appears that on 17th April 1923, subsequent to this mortgage, the occupancy holding was sold in execution of a rent decree of the landlord and purchased by the appellant, defendant 3. After the institution of the present suit that defendant (defendant second party) proceeded under S. 167, Ben. Ten. Act, to annul the encumbrances of the plaintiffs and contested the suit so far as the passing of the mortgage decree was concerned. The mortgagor-defendant did not enter appearance either in the suit or in the appeal before us. The question to be decided by the Court below was: (1) whether the application before the Collector filed by defendant 3 for the issue of notices under S. 167 was within one year of his having come to know of the encumbrances and (2) whether the said notices were properly served upon the plaintiffs. The lower Court has decided both these points against defendant 3 and has passed a decree for sale in the usual terms. He has held that defendant 3 came to know of the mortgage at the time of the sale or soon after it and that the notices were not properly served. Defendant 3 has appealed.

On his behalf it has been contended by Mr. Manuk that the notices were properly served and the view of the law taken by the Court below about the onus of proof, effect of the order of Collector and the sufficiency of service is wrong and that it has not been proved that defendant 3 came to know of the encumbrances prior to the date of knowledge alleged by him.

In my opinion these contentions are well founded and must prevail.

I take up the question of knowledge. The plaintiffs' first contention is that defendant 3 came to know of the mortgage at the time of the sale itself. The only evidence on this point is that of Puran Lal Dutt, witness 3 for the plaintiffs. This witness says that he was one of the bidders at the sale and having been informed by defendant 6 that the property was encumbered he did not bid high. This story is obviously unreliable. In a sale held in execution of a rent decree the question of encumbrances is not a factor which a bidder takes into his consideration. A holding is sold with a right to the purchaser to annul the encumbrances by taking steps under S. 167, Ben. Ten. Act. Then looking at the bid-sheet (Ex. 2) it appears that this witness did bid up to Rs. 1,025. The bids were as follows :

				Rs.
Puran Lal Dutt	...	...	...	700
Decree-holder	...	...	...	800
Defendant 3	...	...	...	1,000
Decree-holder	...	...	...	1,020
Puran Lal Dutt	...	...	...	1,025
Defendant 3	...	...	...	1,041

From this it is clear that Puran Lal Dutt did bid up to Rs. 1,025 and the property was knocked down to defendant 3 at Rs. 1,041. Therefore the story that he refrained from bidding high on the ground of there being an encumbrance on the property cannot be believed. His bid was almost as high as that of defendant 3. Then again it is strange that having seen defendant 3 outbidding him he still acted upon his information. The story is obviously a got up one and I do not believe it.

The next contention of the plaintiffs is that at any rate defendant 3 came to know of the mortgage soon after the sale. It appears that the principal defendant, the mortgagor, applied to set aside the sale under O. 21, R. 90 and in that proceeding summoned the plaintiff as a witness to appear and produce "a rehan bond executed by Biseswar Chaudhury and others." It is urged that the summons gave defendant 3 information of the mortgage. I am unable to uphold this contention. It appears from the order-sheet of the execution case (Ex. 4) that the application for setting aside the sale was dismissed for non-prosecution. There is nothing to show that any rehan

deed was produced before the Court or that the plaintiff appeared in response to the summons. Rather it is clear that on the date fixed the objector's (principal defendant in this case) witnesses were not present. There is no evidence that defendant 3 came to know of the contents of the summons. Apart from this the words "rehan bond executed by Biseswar Chaudhury and others" in the summons were not enough to give anyone any idea that it referred to the mortgage bond in suit. There is no mention of the property mortgaged nor of the person in whose favour the mortgage was executed. I therefore hold that it has not been proved that defendant 3 came to know of the mortgage prior to the date of knowledge alleged by him.

Coming to the question of the service of notices upon the plaintiffs, it appears that the notices were taken to them on two occasions, once on 3rd January 1928, and then again on 24th January 1928. On both the occasions the plaintiffs were not found and there were, what is called, substituted services. Afterwards defendants 3 sent a notice by registered post which was returned unserved and the postal peon Prayagdat Missir (witness 2) swears that he took the notice to the plaintiffs and they refused to take it. I see no reason to disbelieve this witness. Though this postal notice is not a legal notice, it proves that the plaintiffs were avoiding the services of the notices on them. The story put forward by the plaintiff is that Nandkishore Lal, one of the plaintiffs, had been during this period ill at Bhagalpur and it is argued that no step was taken to have the notice served upon him there; but on this point the evidence of the witnesses is contradictory. P. W. 2 (Sundar Lal) deposed that Nandkishore the plaintiff was ill at home while the P. W. 4 (Mukti Narain Prasad) deposed as follows :

"My uncle Nandkishore is ill at Bhagalpur. He is there from December last."

It is impossible to believe these contradictory statements of the plaintiffs' witnesses. It is clear from the record that defendant 3 was anxious to have the notice served upon the plaintiffs: he took all possible steps which he could. When on the first occasion the notice was returned after a substituted service the Collector directed their re-issue and to have them served again. Defendant 3

took steps to do so and to be on the safe side sent a notice by post and this also the plaintiffs refused to accept. The peon who went to serve the first notice has been examined but the one who took out the notices on the second occasion was not available. The Collector was however satisfied as to the proper serving of this notice and there is a note to this effect in his order-sheet.

The learned advocate for the respondents has however relied upon the case of *Hitnarayan Singh v. Rambarai Rai* (1) and argued that an entry in an order-sheet of the Collector in a proceeding under S. 167, Ben. Ten. Act, to the effect that notice has been served is no proof of the service of the notice. In this case referring to the order-sheet of the Collector, Das, J., observed as follows:

"The order-sheet in this case merely records an opinion of the Collector that the notices were served but the opinion of the Collector is in no way binding upon the civil Court and the civil Court has a right to determine for itself the question whether the notices were in fact served or not."

No doubt the observation is on somewhat wide terms; but this view of the law is contrary to what has been laid down in various decisions of the Division Bench of this Court. In *Kuldip Narain v. Ram Lal* (2), Das, J., himself, relying upon the decision of *Nandkishore v. Rameshwar Singh* (3), held that once the notice was issued the onus is upon the person questioning the validity of the notice to establish that the notice under S. 167 was not served in accordance with law, and held that it was for the plaintiff to establish that notice was not served upon him within the period of limitation. It will thus appear that one of the learned Judges who was a party to the decision of *Hitnarayan Singh v. Rambarai Rai* (1) held otherwise in an earlier case and Kulwant Sahay, J., agreed with this view which is supported by the decision of Sir Dawson-Miller, C. J., and Mullick, J., in the case of *Nandkishore v. Rameshwar Singh* (3) referred to above and the case of *Ram Protap v. Jhoomak Jha* (4) decided by Roe and Jwala Prasad, JJ. Mr. Shambhu Saran has relied upon some Calcutta cases: they have been referred to in *Hitnarayan*

(1) A. I. R. 1928 Pat. 459 = 115 I. C. 196 = 7 Pat. 733.

(2) A. I. R. 1928 Pat. 318 = 107 I. C. 821 = 7 Pat. 260.

(3) A. I. R. 1924 Pat. 515 = 78 I. C. 476.

(4) [1917] 39 I. C. 943.

Singh's case (1). I do not however propose to discuss them in detail. In my opinion the weight of the judicial decisions of this Court is in favour of the view that a certificate in the order-sheet of the Collector that the notice has properly been served is prima facie evidence that such a notice has been served but it is not conclusive. It is open to the other party to challenge it and show that the notices were not served in time, but, in the absence of any evidence to the contrary, such a service must be presumed. As I have said, the case of *Hitnarayan Singh v. Rambarai Rai* (1) seems to lay down otherwise but the weight of authority is against this view.

I am satisfied on the evidence adduced that the notices were properly served. Under the rules of the Government of Bengal the notice under S. 167, Ben. Ten. Act, is to be served in a manner provided for the service of summons under the Civil Procedure Code. Mr. Sambhu Saran has relied upon a number of decisions as to the sufficiency or otherwise of a substituted service. I do not propose to deal with them. I am satisfied that the plaintiffs were avoiding the service of notices upon them.

The result is that the appeal must be allowed; the decree of the lower Court for the sale of the mortgaged properties should be set aside and the plaintiffs' suit as against defendant 3 must be dismissed; but under the circumstances the said defendant should bear his own costs throughout. Plaintiffs are however entitled to a simple money decree against defendants 1 and 2. Simple mortgage prima facie carries with it a stipulation to pay the debt. In the bond in suit there is a clear promise of payment. The bond is a registered one and the suit is within six years of the due date. There is a cross-objection on behalf of the plaintiffs as to the amount of interest. I see no reason to interfere with the direction exercised by the lower Court and would dismiss it. There will therefore be a simple money decree in favour of the plaintiffs against defendants 1 and 2 with costs and interest at the rate ordered by the Court below till the institution of the suit and thereafter at 6 per cent per annum. The plaintiffs will bear their own costs of this appeal. The suit as against defendant 3 is dismissed but without costs.

Scroope, J.—I agree. The weight of judicial decisions in this Court is in favour of the view that once there has been a proceeding before a Collector under S.167, Ben. Ten. Act, with a view to annulling an encumbrance and the Collector had certified the due services of notice in such a proceeding the onus of establishing non-service is on the person who alleges it. I refer to the decision in *Kuldip Narain v. Ram Lal* (2) which followed two previous decisions of this Court, *Dhunmun Singh v. Lachmilal* (5) and *Nandkishore v. Rameshwar Singh* (3). It is difficult to reconcile the decision in *Hitnarayan Singh v. Rambarai Rai* (1) relied on for the respondents in which it was held in effect that the Collector's certificate in such a proceeding was merely a record of his opinion and left the matter completely open for the civil Court, with the decision in *Kuldip Narain v. Ram Lal* (2) to which one of the learned Judges who decided *Hitnarayan Singh v. Rambarai Rai* (1) was a party. In *Kuldip Narain v. Ram Lal* (2) that learned Judge in dealing with this question observed:

"The decisions of this Court are perfectly clear. It was held by this Court in *Nandkishore v. Rameshwar Singh* (3) that the onus is upon the person questioning the validity of notice to establish that the notice under S. 167 was not served in accordance with law."

The only dissenting decision of this Court is the subsequent decision of the same learned Judge in the latter Patna case.

R.M./R.K.

Appeal allowed.

(5) A. I. R. [1920] Pat. 65=57 I. C. 492.

* A. I. R. 1932 Patna 126

MACPHERSON AND DHAVLE, JJ.

Ramlakhan Chaudhury—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 64 of 1931, Decided on 20th May 1931.

* Criminal P. C. (1898), S. 439, Cl. 6—Where appeal of accused is heard by High Court Cl. 6 does not apply.

The dismissal of the appeal preferred by the accused is in no way a decision that the sentences should not be enhanced and sub-S. (6) which was added to S. 439 by the amendments of 1923 has no application to a case where the appeal of the accused had been heard by the

High Court itself. The appellate judgment is not concerned with the question of enhancement of the sentence which only arises in the exercise of revisional jurisdiction and the sentence to be revised and enhanced is the sentence passed not by this Court but by the Court of Session. The question of enhancement is entirely foreign to an appeal and can only be dealt with in the exercise of the revisional jurisdiction of the High Court: *A. I. R. 1926 Bom. 555, Foll.*; *A. I. R. 1929 Lah. 797* and *A. I. R. 1925 Mad. 993, Ref.*

Sub-section 6, S. 439 does not apply to a convicted person whose appeal has been heard by the High Court itself and the High Court will not entertain a revisional application at the instance of an accused person, whose appeal has been disposed of by the High Court itself. There is nothing in S. 439 to restrict a rule for enhancement to any particular time after the conviction.

[P 127 C 2, P 128 C 1, 2]

S. N. Sahay, R. Misser and P. N. Gaur—for Appellant.

Government Advocate and Gopal Prosad—for the Crown.

Dhavle, J.—This is a rule calling upon Ramlakhan Chaudhury and Anup Lal to shew cause why the sentences passed upon them by the Sessions Judge of Darbhanga—under Ss. 148 and 304, I. P. C., in the case of Ramlakhan and under Ss. 147 and 325, I. P. C., in the case of Anup Lal—should not be directed to run consecutively, and not concurrently as ordered by the learned Sessions Judge, or otherwise enhanced. We directed the issue of the rule by our judgment of the 22nd April last dismissing the appeal preferred by these two and six other persons. At the hearing of the appeal we asked Mr. S. N. Sahay, who appeared for the appellants, to shew cause why the sentences passed upon these two men should not be directed to run consecutively, but Mr. Sahay was unprepared to meet it and prayed that notice may be issued to the men concerned.

In shewing cause Mr. Sahay has urged at the outset that with the disposal of the appeal on the 22nd April this Bench, and indeed this High Court, is functus officio and has no jurisdiction to hear the matter at all. His argument is that the appellate judgment is under S. 430, Criminal P. C., final and that the Court has jurisdiction to revise the orders only of inferior criminal Courts—(see S. 439 which must be read with S. 435, Criminal P. C.), or of Courts subject to its appellate jurisdiction—(see Cl. 21, Letters Patent of this High Court). It is however clear that the contention overlooks the fact that the appellate judgment was

not concerned with the question of enhancement of the sentence which only arises in the exercise of our revisional jurisdiction and that the sentence to be revised and enhanced is the sentence passed not by this Court but by the Court of Session in Darbhanga. The point was fully dealt with in *Emperor v. Jorabhai Kisanbhai* (1), a case in which the Bench that heard a criminal appeal was moved, after the delivery of the appellate judgment dismissing the appeal, to issue a notice to the accused to shew cause why the sentence should not be enhanced.

The Bench that disposed of the rule pointed out that the dismissal of the appeal was in no way a decision that the sentences should not be enhanced and that sub-S. (6) which was added to S. 439 by the amendments of 1923 had no application to a case where the appeal of the accused had been heard by the High Court itself. The ruling in *Jorabhai's* case (1) was referred to with approval in *Emperor v. Dhanna Lal* (2) though the point for decision in the later case was whether the rejection of a petition for revision by the accused debarred him from exercising the right given by sub-S. (6), S. 439 to shew cause against his conviction. By a somewhat similar train of reasoning it was held by the Madras High Court in *Anif Sahib, In re* (3) that the dismissal of a revision petition did not prevent the High Court from enhancing the sentence passed upon the petitioner after giving him notice. Mr. Sahay has pointed out that the Lahore and Madras cases are cases where the High Court had not itself heard the appeal.

It does not however seem to me that this distinction really strengthens Mr. Sahay's argument, for the question of enhancement is entirely foreign to an appeal and can only be dealt with in the exercise of the revisional jurisdiction of the High Court. Mr. Sahay has had to concede that the Bombay decision is against him; but he has urged that in that decision it was overlooked that incomplete judgments cannot be completed in revision. I am not impressed by this. The appellate judgment cannot be regarded as

(1) *A. I. R. 1926 Bom. 555=97 I. C. 805=27 Cr. L. J. 1173=50 Bom. 783.*

(2) *A. I. R. 1929 Lah. 797=1929 Cr. C. 429=117 I. C. 669=30 Cr. L. J. 815=10 Lah. 241.*

(3) *A. I. R. 1925 Mad. 993=85 I. C. 727=26 Cr. L. J. 583.*

incomplete if it did not dispose of the question of enhancement; it was a judgment on a petition of appeal by the convicted persons, and they could not (in the nature of things) ask for an enhancement of their sentences. It is true that the judgment in the present case, by directing the issue of a notice to two of the appellants, did not finally dispose of the question of enhancement, but as an appellate judgment it was a complete judgment, and it was only the revisional matter of enhancement that was left to be decided in due course. Mr. Sahay has also urged that on the Bombay view it would be open to an accused person, after the dismissal of his appeal, to come up for a reduction of his sentence as it is open to the Crown to apply for an enhancement of the sentence. I am not impressed by this contention also.

It is true that Cl. (6), S. 439 provides that notwithstanding anything contained in the section, any convicted person to whom an opportunity has been given under sub-S. (2) of shewing cause why his sentence should not be enhanced shall, in shewing cause, be entitled also to shew cause against his conviction; but in the three decisions that I have already referred to, it has been pointed out that this subsection does not apply to a convicted person whose appeal has been heard by the High Court itself, and, apart from the subsection, it is perfectly clear that the High Court will not entertain a revisional application at the instance of an accused person, whose appeal has been disposed of by the High Court itself only because of the inherent incapacity of any Bench of the High Court to reconsider a criminal matter disposed of by another Bench (except in such circumstances as, for example, where a point of law is reserved for consideration of the Court), and also because of the rule regarding the finality of judgments in criminal cases. There is nothing in S. 439 to restrict a rule for enhancement to any particular time after the conviction, and it is difficult to see much point in keeping an appellate judgment of the High Court pending merely for the disposal of a rule for enhancement. The hearing of the appeal means hearing all that the appellant desires to say against the conviction and the sentence passed upon him by a lower Court, and at the hearing of a rule for enhancement after the disposal of an appeal

by the High Court, the appellant is outside S. 436 (6) altogether. I would hold accordingly that the disposal of the appeal by us does not prevent the Court from dealing with the rule.

Mr. Sahay has next urged that even if it be ruled that it is competent to the Court, in spite of the appellate judgment to deal with the rule for enhancement, the persons against whom the rule has been issued are entitled, under sub-S. (6), S. 439, in shewing cause, also to shew cause against their conviction; and he has urged that the rule should therefore be heard by another Bench. For the reasons already indicated, this contention must be rejected: the subsection has no application to cases where the appeal has been heard by the High Court itself: see in particular *Emperor v. Jorbhai Kisanbhai* (1).

Coming to the merits: Mr. Sahay has urged that an enhancement is unnecessary as the affair was not a onesided riot and injuries, not all of which were trivial, were received by the men on the side of the appellants, the prosecution witnesses had not given an unvarnished account, and on the evidence it could not be said with certainty which particular blow had been inflicted by the individual offender. It is however perfectly clear that it was Ramlakhan that speared Gursaran on the abdomen, and Anup Lal that fractured the left ulna of Lachmi Misser 4" above the wrist joint. For the offence of rioting these men have received appropriate sentences along with the other men to whom the offence was clearly brought home. There is however no reason to make those sentences concurrent with the sentences passed upon them for the offence under Ss. 304 and 325 respectively.

I would accordingly make the rule absolute and direct that the two sentences passed upon Ramlakhan and Anup Lal run consecutively in each case.

Macpherson, J.—I agree.

K.N./R.K.

Rule made absolute.

* * A. I. R. 1932 Patna 129

KULWANT SAHAY AND JAMES, JJ.

Biseswar Chaudhuri—Appellant.

v.

Kanhai Singh—Respondent.

Appeal Nos. 169 and 193 of 1929, Decided on 5th May 1931.

* * (a) **Provincial Insolvency Act (1920), Ss. 4 and 53—S. 4 is controlled by S. 53 only in respect of transfer made by insolvent—Limitation of two years does not apply to cases of fictitious and benami transfers and Court can decide such questions under S. 4—Its jurisdiction in this respect is not restricted by limitations imposed in S. 53.**

Section 4 is controlled by S. 53 only in respect of real transfers made by the insolvent whereby title has passed from the insolvent to the transferee. Consequently where the insolvent purchases certain property in the name of another person, but the transaction is really a purchase for himself and where the insolvent executes a deed of sale in favour of another person, but there is as a matter of fact no sale and the property still belongs to him, S. 53 does not apply to the transactions and the jurisdiction of the Court in dealing with the transactions is in no way controlled by the limitations imposed by S. 53. The Court can annul the transactions and make a declaration that properties in question belong to the insolvent and vest in the receiver irrespective of the fact whether the transactions took place within two years of the presentation of the petition in insolvency.

The insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent. S. 53 does not deal with the jurisdiction of the insolvency Court, but only lays down certain rules of law affecting those transactions which fall within its scope and it does not control or restrict the jurisdiction conferred upon a Court by S. 4 to decide questions of title. The Court has therefore jurisdiction to decide the question of benami under S. 4 and its jurisdiction in this respect is not restricted by limitations imposed in S. 53. In case of benami transactions, the limitation of two years imposed by S. 53 does not therefore apply: *A. I. R. 1929 All. 105 (F.B.)*; *A. I. R. 1926 Mad. 363* and *A. I. R. 1926 Lah. 679, Foll.*; *A. I. R. 1926 All. 470, Ref.* *A. I. R. 1927 Cal. 474* and *A. I. R. 1930 Oudh 314, Dist.* [P 132 C 1]

(b) **Provincial Insolvency Act (1920), Ss. 4 and 53—It is duty of Court to decide insolvent's title in respect of property in dispute—S. 53 is no bar to determination of such question.**

On an order of adjudication, all the property belonging to the insolvent vests in the Court or in the receiver. When therefore a question is raised whether a certain property is the property of the insolvent or not, it is clearly the duty of the Court to determine the question and the determination of this question is in no way controlled by the provisions of S. 53. [P 132 C 1]

(c) **Benami—Onus of proving title is on one asserting benami.**

In ordinary cases of benami the onus is upon

the party who asserts benami, and in the absence of such evidence the Court is bound to presume that title passed to purchaser under the deed.

[P 133 C 2]

S. N. Sahay, R. N. Lal, S. N. Rai and *B. N. Rai*—for Appellant.

P. Dayal and *Bhagwan Prasad*—for Respondent.

Kulwant Sahay, J.—*Pattilal Chaudhuri* and his sons, who are members of a joint family, were adjudged insolvents on an application presented on 9th September 1926. The order of adjudication is dated 8th June 1927. One of the creditors, *Radhakishun*, filed a petition before the receiver appointed in the insolvency proceedings, stating that the insolvents had fraudulently concealed some of the properties belonging to them and that some other properties had been fraudulently transferred by them within two years of the presentation of the petition for insolvency, and he asked the receiver to take proceedings to annul those transfers and to take possession of the properties sold. The receiver made a report on 25th August 1927, to the District Judge in which he dealt with no less than fifteen properties and he asked the Court to annul the transfers in respect of the properties which had been transferred within two years of the presentation of the petition in insolvency, and he further asked the Court to make a declaration to the effect that certain other properties belonged to the insolvents and that they had vested in the receiver. On the same date he filed a regular petition before the District Judge for annulling some of the transfers and for declaring other transfers to be void so far as the receiver was concerned. Objections were made by the persons claiming the properties set out in the receiver's petition, and the learned District Judge proceeded to act under S. 53 in respect of the transfers which were made within two years of the presentation of the petition and under S. 4, Provincial Insolvency Act, in respect of the other properties which the receiver alleged really belonged to the insolvents but in respect of which fictitious deeds of benami nature had been executed. The learned District Judge has, it appears, made an order annulling all the transfers made within two years of the petition of insolvency and, declaring the other transactions to be benami and fictitious transactions declared that the properties co-

vered by those transactions had vested in the receiver.

Two of the claimants in respect of two of the properties have come up in appeal to this Court. Appeal No. 169 is by Bisesar Chaudhury who claims the property which is Serial No. 13 in the receiver's petition to the District Judge. This property consists of 2 bighas 2 dhurs of occupancy kasht land in village Sharfuddinpur, bearing khata No. 3. The appellant in Appeal No. 193 claims the property No. 8 in the said schedule which consists of one anna milkiat share in village Madhopur, tauzi No. 1774.

The facts relating to these two properties have to be dealt with separately; but there is one question which is common to both the appeals and may be disposed of in the beginning. As regards property No. 13 the allegation is that this property, viz., the 2 bighas 2 dhurs of occupancy kasht land in Sharfuddinpur was purchased by the insolvents under a deed of sale dated 2nd March 1909, in the farzi name of one Bhondulal Chaudhuri. The receiver's case is that Bhondulal Chaudhuri was a mere benamidar for the insolvents and the purchase was really made by the insolvents and that they have continued in possession ever since the purchase. The case of the receiver as regards property No. 8 is that the insolvents had executed a benami deed of sale in respect of this property on 24th July 1923, in the name of one Jaikishun Chaudhuri, but as a matter of fact there was no transfer and that Pattilal Chaudhuri the insolvent has continued in possession of this property also. The question for consideration therefore is whether the two properties forming the subject-matter of these appeals do really belong to the insolvents and whether the deed of sale taken in the name of Bhondulal and the deed of sale executed in favour of Jaikishun Chaudhuri were mere benami transactions. These two transactions took place more than two years before the presentation of the petition in insolvency and it is contended by the learned advocate for the appellants that having regard to the provisions of S. 53, Provincial Insolvency Act, the Court had no jurisdiction to annul these transactions and to make the declaration that these properties belonged to the insolvents and had vested in the receiver. As I have already

stated, the learned District Judge proceeded in respect of these two properties under S. 4 of the Act. This section is comprehensive in its terms and gives power to the Court to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. Prima facie therefore the District Judge had under this section complete jurisdiction to decide the question whether the properties in dispute do really belong to the insolvents or to the persons who claim them. It is however contended that the opening words of this section: "Subject to the provision of this Act," indicate that the Court in exercising jurisdiction under the section is bound by the limitations imposed by S. 53; in other words, that in every case in which a transaction is challenged such transaction must have taken place within two years of the presentation of the petition in insolvency in order to give jurisdiction to the Court to decide the question of title raised before it. In my opinion this contention is not sound. S. 4 is controlled by S. 53 only in respect of transfers made by the insolvents. S. 53 deals with a real transfer of the property made by the insolvent whereby title has passed from the insolvent to the transferee. In such cases the law gives power to the Court to annul such real transfers if made within two years of the presentation of the petition, provided they are not transfers made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration. The transactions that we are now concerned with are alleged by the receiver not to be transfers at all. It is alleged in one case that, although the property was purchased in the name of one Bhondulal, it was really a purchase made by the insolvents. In the other case it is alleged that although the insolvent purported to execute a deed of sale in favour of Jaikishun Chaudhuri, as a matter of fact there was no sale and the property still belongs to the insolvents. S. 53 therefore has absolutely no application to the facts of the present

case, and the jurisdiction of the Court in dealing with these two transactions under S. 4 is in no way controlled by the limitation imposed by S. 53.

Section 4 was introduced for the first time in the Act of 1920 and did not find a place in the Act of 1907. There was a difference of opinion between the Calcutta and the Allahabad High Courts on the question whether the insolvency Court could or could not deal with the question of title to property. The Calcutta High Court had in the year 1918 held that the question of benami could not be determined by the insolvency Court, and any claim made by the receiver or the creditor that the property is really the property of the insolvent can only be enforced by a suit in the regular course: see *Nilmoni Choudhury v. Durga Charan* (1). The learned Judges, however, had observed even then that:

"Where the benami character of the title is admitted or where the veil is transparent and the insolvent is in substantial beneficial possession the Court may order the delivery of the property to the receiver."

The Allahabad High Court, however, had in 1914 come to the contrary conclusion in *Bansidhar v. Kharagjit* (2). There were thus two conflicting decisions on the same point under the Provincial Insolvency Act 1907. The legislature, when enacting the Act of 1920, introduced S. 4 in the Act for the first time, whereby extensive powers have been given to the Court to decide all questions of title or priority or of any nature whatsoever which may arise in any case of insolvency coming within the cognizance of the Court.

That the Court has jurisdiction to decide questions of benami under S. 4 and that its jurisdiction in this respect is not controlled by the limitations imposed by S. 53 has been held in various cases in the Allahabad, Lahore and Madras High Courts. In the Full Bench decision of the Allahabad High Court in *Anwar Khan v. Muhammad Khan* (3) the majority of the Judges held that an insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent, and they observed that S. 53 does not deal

with the jurisdiction of the insolvency Court but only lays down certain rules of law affecting those transactions which fall within its scope and that it does not control or restrict the jurisdiction conferred upon a Court by S. 4 to decide on questions of title. Sen, J., no doubt took a different view, but the decision of the majority of the Judges was in favour of the view that S. 4 is not controlled by S. 53.

In *Hari Chand v. Moti Ram* (4) Sulaiman, J., held that a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled, but all that the Court has to do in such a case is to decide that it is void and that such decision will bind the claimant of the property as if it were by an ordinary civil Court; and he further held that the limitation of two years prescribed by S. 53, applied only to such cases where the transfers when originally made were good transfers of property and not to cases in which there was no real transfer at all. In this case also the other learned Judge, Mukharji, J., took a different view; but the Full Bench decision of the Allahabad High Court referred to above must be held to have overruled the view expressed by Mukharji, J. In fact one of the learned Judges, Dalal, J., observed that every Judge of the Allahabad High Court except one who had to consider the point, had decided in favour of the jurisdiction of the insolvency Court.

In *Chittammal v. Ponnusami Naicker* (5), the Madras High Court held that it was open to the Court on a proper application being made under S. 4, Provincial Insolvency Act, to try the issue whether the insolvent is entitled to the property or not.

The same view was taken by the Lahore High Court in *Wazir Singh v. Janki Das* (6).

The learned advocate for the appellants has referred to the decision of the Oudh Chief Court in *Amjad Ali v. Nand Lal* (7). This case however does not support the appellants at all. In this case the transaction under consideration was a release

(1) [1918] 46 I.C. 377.

(2) A.I.R. 1914 All. 220=27 All. 65.

(3) A. I. R. 1929 All. 105=113 I.C. 819=51 All. 550 (F.B.).

(4) A. I. R. 1926 All. 470=94 I. C. 429=48 All. 414.

(5) A. I. R. 1926 Mad. 363=92 I. C. 573=49 Mad. 762.

(6) A. I. R. 1926 Lah. 679=97 I. C. 174.

(7) A. I. R. 1930 Oudh 314=123 I. C. 217=5 Luck 742.

by the insolvent made more than two years before the date of adjudication. In considering the transaction the learned Judges observed as follows:

"We cannot accede to the argument of counsel that a deed of release accompanied by mutation and transfer of possession is not a transfer. It may have been a fraudulent transfer in order to defeat the creditors of the transferor, but it is none the less a transfer."

It was therefore on a finding that there had been a transfer that the learned Judges held that S. 53 applied and that it could not be voided if made more than two years before the adjudication. They however distinguished the decision of the Calcutta High Court in *Fool Kumari v. Khirod Chandra* (8), with the observation that that decision dealt with a case in which the transaction was held to be benami and that there had been no transfer in fact, nor was the Court required to annul the transfer. This decision therefore is in favour of the view that in benami transactions the limitation of two years imposed by S. 53 does not apply, and the Court can decide the question under S. 4 even if the transaction took place more than two years before the presentation of the petition in insolvency.

There is another fact which also deserves consideration. Under S. 28 (2) of the Act the effect of the making of an order of adjudication is that the whole of the property of the insolvent vests in the Court or in the receiver and becomes divisible among the creditors. S. 56 provides that upon the appointment of the receiver the property of the insolvent shall vest in him and S. 59 provides that subject to the provisions of the Act the receiver shall with all convenient speed realize the property of the debtor and distribute dividends among the creditors entitled thereto. Therefore all properties belonging to the insolvent vest in the Court or in the receiver. When a question is raised whether a certain property is a property of the insolvent or not it is clearly the duty of the Court to determine the question, and the determination of this question is in no way controlled by the provisions of S. 53. As I have already stated S. 53 deals with cases where title to the property has passed from the insolvent to a third person. The cases we are now dealing with are cases in which the allegation is that the property is still the property of the insol-

vents and title has not passed to third persons. I am therefore of opinion that the order made by the District Judge was with jurisdiction.

I have now to deal with the facts of each case separately. Appeal No. 169 relates to property No. 13 in the schedule attached to the receiver's petition. This is an occupancy kasht right in two bighas odd of land in Mauza Sharfuddinpur. It was purchased by one Bhondulal Chaudhuri under a deed of sale, dated 2nd March 1909. Bhondulal is dead and his son Biseswar Chaudhuri, who is the appellant in Appeal No. 169, claims the property as his. The evidence shows that although the kasht right stands in the name of Bhondulal, yet the insolvent Pattilal was all along in possession. Village Sharfuddinpur, where this kasht right is situated is owned by Umakant Prasad and Ram Charitar Misser, the former being the owner of 3 annas and the latter of 13 annas. Receiver's witness 2, Singheshwar Lal, is the patwari of Umakant Prasad. He deposes that the holding of 2 bighas odd is in the possession of Pattilal who pays the rent and gets receipts, that Bhondulal and his son Biseswar never paid rent on account of the holding, nor had they possession; he produced his counterfoils and seahas which show that rents had always been paid by Pattilal. No doubt, in the jama-bandis the name of Bhondulal appears as the tenant, but that must be so inasmuch as the sale deed stood in his name. There is no explanation why Pattilal always paid the rent and why rent was never paid by Bhondulal or by his son Biseswar. The appellant produced two rent receipts (Exs. A-1 and A-2) in support of his case that the rents had been paid by him. Ex. A-1 is a receipt in respect of the rent for 1330. It shows a payment of Rs. 5 on 11th Jeth of that year, and the payment appears to have been made through Munilal Chaudhuri. The case of the appellant is that this Munilal Chaudhuri is his uncle and that the rent was paid by him through his uncle. The learned Judge points out that in the receipt the name was originally Pattilal Chaudhuri and that this had been altered into Munilal Chaudhuri. The alteration is clear on an examination of the receipt itself. We looked into the counterfoil corresponding with this receipt and in that counterfoil the name is

Pattilal and there is no alteration whatsoever. It is clear therefore that "Patti" has been altered into "Muni" in this receipt Ex. A-1 in order to show that the rent had not been paid by Patti. The other receipt produced by the appellant, viz., Ex. A-2 which relates to the year 1331, was in respect of two payments of Rs. 2 and Re. 1 made in Asin and Phagun. In this receipt there is nothing to show through whom the payment was made. It is contended that these two payments were made by the appellant. It is however remarkable that the receipt itself stands not in the name of the appellant but in that of his father Bhondu Lal Chaudhuri; and when payment was made by some person other than the person whose name stands in the receipt and that person's name is not given in the receipt, it cannot be concluded that the payment must have been made by Biseswar. The learned Judge has also referred to the fact that the land lies eight miles away from the place of residence of Bhondu who has no other land in this village, and it is not likely that he would purchase a small raiyati holding of two bighas odd at a place eight miles distant from his ordinary place of residence. Having regard therefore to the evidence of the case, I am not prepared to hold that the view taken by the learned District Judge in this case was incorrect. I would therefore hold that the property is a property of the insolvent and that the receiver may sell this property in order to pay off the creditors. Appeal No. 169 must therefore be dismissed with costs.

As regards Appeal No. 193 the facts are these: The property in dispute, viz., the 1 anna share in village Madhopur, tauzi No. 1774, was sold by the insolvents to Jaikishun Lal under a deed of sale, dated 24th July 1923. The necessity for which the sale was made is set out in the deed. The necessity consisted of debts due from the insolvents under hand-notes to several persons and a sum of Rs. 600 due to the purchaser Jaikishun Lal himself. Jaikishun Lal has produced two of the hand-notes (Exs. E and G) with endorsements of satisfaction thereof by means of payment made by Jaikishun Lal Chaudhuri himself. There is no reason to doubt the genuineness of these hand-notes or the truth of the payments endorsed thereon. It is true that there is no evi-

dence as regards the other hand-note and the debt of Rs. 600 due to Jaikishun Lal; but there is no reason to suppose that these recitals were falsely made. It is said that this deed of sale was executed only a few days before a suit was instituted by one Sitaram, a creditor of the insolvents, against them. Sitaram applied for attachment of this property before judgment. In that proceeding Jaikishun Lal filed an objection claiming this property as his. The Subordinate Judge disallowed the claim as he was of opinion that the deed of sale was not a bona fide transaction and it appeared to him to be a farzi document. Jaikishun Lal instituted a suit for declaration of his title to this property. This was Suit No. 107 of 1924 and Sitaram, the creditor, was the defendant in this suit. We find from Ex. 1 that there was a compromise between Jaikishun Lal and Sitaram, whereby Sitaram acknowledged the title of Jaikishun Lal to this property and Jaikishun Lal executed a security bond in favour of Sitaram for the amount that might be decreed in favour of Sitaram against the insolvents. Sitaram's suit against the insolvents was decreed and in order to pay off the decree of Sitaram for which Jaikishun Lal had stood surety, the latter executed a mortgage bond, dated 8th July 1925, mortgaging this very property to one Nirsu Chaudhuri for a sum of Rs. 1,750, and thus paid off the decree of Sitaram. It is contended that this shows that the property was really the property of the insolvents and that it is unusual for a person who stands surety to pay off the debt without the creditor making any attempt to realize the debt from the principal debtor. There may be reasons why Jaikishun Lal paid off the debt before an attempt was made to realize the debt from the insolvents; but what we have to consider is, whether there is any legal evidence on the record to justify the finding that the transaction of sale evidenced by the deed of 24th July 1923, was a benami transaction. In ordinary cases of benami the onus is upon the party who asserts benami, and in the absence of such evidence the Court is bound to presume that title passed to the purchaser under the deed.

The only evidence given is evidence of the fact that the collection of the toll in respect of the *hat* which is held in this property was made by Pattilal and not by

Jaikishun. The first witness on the point is the Patwari Singheshwar Lal. He is the Patwari of Sharfuddinpur and not of Madhopur with which we are here concerned. He states in cross-examination that his maliks have no share in Madhopur. He says that three or four years before the date of his deposition he made certain collections at the market at Madhopur.

The collections that he refers to could not have been the collections of rents from the shopkeepers or stall-holders in the *hat* at Madhopur; it must relate to the collection of rents from tenants of his own village Sharfuddinpur who might have gone to the *hat* at Madhopur. If that is so, then he seems to be a mere chance witness. He says that the landlords, including Pattilal, divided the proceeds in his presence. If that is so, then much better evidence could have been produced by the receiver in support of his case. He has called one Sheosagar Misser who is the Tahsildar of Madhopur. This tahsildar could have produced his papers to show that the collections were divided and Pattilal took his one-anna share thereof. He says in his cross-examination that he writes collection papers: but he was never asked to produce them. The next witness, Lekia Rout, is a cosharer in Madhopur. He no doubt says that Patti has one-anna share; but in cross-examination he deposes that he has no paper to prove the present possession of Pattilal. The last witness Baijnath Prasad, who is a witness to the deed of sale, says that it was a farzi transaction and that the executants said that they were about to be sued by the creditors. It is unlikely that a person who enters into a benami transaction should go about proclaiming the fact to everybody. I am therefore of opinion that the evidence adduced in this case is not sufficient to prove that the transaction was a benami transaction, or that Pattilal, the insolvent, continued in possession thereof. It is said that there was no reason why Jaikishun should stand surety for him. It appears that they were friends, and that subsequently they have become relations by marriage. There is the further fact that ultimately the property was mortgaged in order to pay off the debts of the insolvents; but these are circumstances which merely raise a suspicion of benami and they do not amount to legal evidence of the fact of benami. I would therefore hold that in

the case of this property (No. 8 of the receiver's schedule) the view taken by the learned District Judge is not correct. I hold that it has not been established that the deed of sale of 24th July 1923, was a benami transaction. I would set aside the order of the District Judge and decree Appeal No. 193 with costs.

James, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1932 Patna 134

MACPHERSON AND FAZL ALI, JJ.

Gokul Krishna Banerji and another—Appellants.

v.

Secy. of State—Respondent.

First Appeals Nos. 31 and 32 of 1929, Decided on 15th May 1931, against decision of Dist. Judge, Manbhum, D/- 10th October 1928.

(a) Land Acquisition Act (1894), S. 25 (2)—Respondent can, in appeal, resist further enhancement of award—S. 25 (2) being bar to further enhancement—Civil P. C., O. 41, R. 22.

Section 25 (2) is a bar to further enhancement of an award in appeal. [P 138 C 2]

The respondent is entitled in appeal to resist further enhancement of the award on the ground that the statute forbids any enhancement including that already allowed by the Court. O. 41, R. 22, Civil P. C., permits the respondent to avail himself of any plea that he took in the lower Court. [P 138 C 2]

(b) Land Acquisition Act (1894), Ss. 9 and 25 (2)—Sufficient reason for omitting to make claim—The point is whether defects in notice under S. 9 constitute sufficient reason.

(Per Macpherson, J.)—The point, in a notice given under S. 9 in pursuance to which a claim for compensation is to be made, is not whether the notice was in all respects full and legal, but whether the defects in the notice constituted sufficient reason for omitting to make a claim. [P 141 C 1]

Where although the notice under S. 9 was not full and legal in all respects, i. e., there were defects as regards the date and the name of the place and the insertion of a plot which did not exist, but the party was in fact served with notice and sent his agent to the place of inquiry and the agent objected to the classification and measurement but made no mention of the amount of compensation:

Held (Per Macpherson, J.)—That none of the items could be said to constitute sufficient reason for omission to mention amount of compensation nor could all of them put together. [P 141 C 1]

(c) Land Acquisition Act (1894), S. 9—S. 9 does not require 15 clear days' notice.

Section 9 does not require 15 clear days' notice of the date fixed for preferring the claim. The statute sets out only that the date must not be earlier than 15 days from the service of the notice. [P 141 C 1]

(d) Land Acquisition Act (1894), S. 11—Proceedings.

The proceeding under S. 11 is not a judicial proceeding. [P 142 C 1]

(e) Land Acquisition Act (1894), S. 11—Valuation—Collector is not limited to evidence taken before claimant.

The Collector, while making valuation of the land, is not limited to evidence taken before the parties or disclosed at the inquiry. [P 142 C 1]

(f) Land Acquisition Act (1894), S. 11—Main principles on which lands are valued, correct—High Court should not disturb conclusions of lower Courts merely because there is difference of opinion as to details.

(Per *Fazl Ali, J.*)—Once it is found that the main principle on which the lands have been valued is correct it is neither usual or proper for the High Court to lightly disturb the conclusion arrived at by the lower Courts which must be assumed to be familiar with the local conditions, merely because more than one view is possible as to what are mere details.

[P 142 C 2]

S. M. Mullick, S. C. Mazumdar and *G. C. Mukherji*—for Appellants.

Government Pleader—for Respondent.

Macpherson, J.—Appeal No. 31 is preferred by Gokul Krishna Banerjee from the decision in case No. 180 and Appeal No. 32 by Sasadhar Mukherjee from the decision in case No. 184. These two cases and seven others arose out of references to the Court under the Land Acquisition Act in connexion with the acquisition for the Indian Copper Corporation, Ltd., of an area of 453.59 acres situated in Mauza Maubhandar about a mile from Ghatsila and about 22 miles from Jamshedpur in the Dhalbhum Estate. Four appeals were preferred of which two (under S. 30) have been separately dealt with. Separate paper-books have been prepared and the proceedings have somewhat unfortunately been printed in one of the less important appeals.

The references in cases Nos. 180 and 184 were under S. 18 of the Act, substantially in regard to the amount of compensation. Banerji has been awarded Rs. 5,429-4-3 in respect of 98.78 acres of land including compensation for trees standing thereon. He disputed the measurement and classification of the lands as well as the rates allowed for the different classes of lands. There was also a claim for enhanced valuation of trees and in respect of two tanks. He claimed in all Rs. 21,535-11-10 including 15 per cent under S. 23 (2) of the Act. He has long been the Dewan of the Midnapore Zamindary Co. Ltd., lessee from 1905 to

1930 of the Dhalbhum estate, and he claimed as a raiyat under the company. A portion of his tenancy of 340 Dhalbhum bighas was acquired leaving him about 100 bighas—A Dhalbhum bigha equals 418 acre.

In case No. 184 Mukherji also claimed as a tenant under the company. He contended that the sum of Rs. 1,915-15-2 awarded to him in respect of 16.82 acres of land was unfair and claimed Rupees 12,104-9-9.

The Secretary of State pleaded the provisions of S. 25 (2), Land Acquisition Act, in bar; but the plea was not sustained. On the question of amount of compensation, the objectors did not at the trial dispute the measurements; Banerji disputed the classification of six plots but unsuccessfully, and the real contest ranged round the reasonableness of the rates allowed for each class of land.

For the purposes of these appeals agricultural lands in Dhalbhum fall into bahal or low rice land, bad or terraced slope, and gora or cultivated upland, the first two classes being also awal or doem, first class and second class, and sometimes soem third class; bastu is house-site land and udbastu is the land outside the bastu, well fenced and manured as distinguished from gora.

The Court found that there were no materials in respect of previous private sales of any portion of the land or indeed in the village and that nothing could be inferred from the prices at which similar lands in the vicinity had been sold. The area is governed by the Chota Nagpur Tenancy Act which broadly prevents sales of raiyati holdings. By a notification of June 1924 it was made permissible for a raiyat to sell to a man of his own tribe or caste in certain very limited circumstances. Only one case of this nature is adduced prior to the date of the notification under S. 4, which was published on 13th May 1925, an area of 1 bigha 8 kathas 4 dhurs was sold for Rs. 76 in Pargana Dhalbhum and the appellants do not rely on that. On behalf of Mukherjee two land acquisition awards were adduced as basis for calculation: one in respect of waste land adjoining Ghatsila Middle English School and situated in close vicinity to the town, and the other in Bhelaipahari in respect of which the Judge remarked:

"Neither of these two cases can serve as an index to the value to be assessed upon similar lands in Maubhandar;"

and indeed the second followed the award made in the decision of Mr. (now Mr. Justice) Scroope in 1920 in the "Greater extension of Jamshedpur" acquisition of 1918. They have not been cited in this Court on behalf of the appellant. On the other hand, it was proved that awards at a far lower rate were made in respect of the acquisition for Mushabani Ghatsila Road and the Ghatsila Charitable Dispensary. The appellants concentrated upon the method of allowing

a certain number of years' purchase of the annual profits of the land, making allowance for situation. They attached little importance to the oral evidence adduced by them to show the capacity of each class of land and took their stand upon the judgment of Scroope, J., aforesaid. The Collector valued the lands under reference on the basis of that judgment deducting an allowance of about one-sixth (not one-fifth as stated by the Court) for difference of situation. The following table elucidates matters. The relative value of classes of land is based on the Settlement Report.

Classes of land.	Relative value of land	Allowed by Mr. Scroope per bigha (Jamshedpur)	Equivalent per acre (Jamshedpur)	Per acre allowed by Collector in this case	Claim by Banerji (and by Mukherji in appeal)	Allowed by the Land Acquisition Court.
Bahal awal	16	100	287	240	358	300
Bahal Doem	12	75	215	180	262	225
Bad awal	8	50	143	120	191	150
Bad Doem	6	33	107	80	143	100
Gora	1	7	16	17	47	21½

Mukherji claimed much higher rates originally. The method adopted by Mr. Scroope and followed by the Judge was to take the produce of awal bahal land at 24 maunds per acre as shown in the Settlement Report and the other classes of lands in proportion to the soil rates assessed at the time of fair rent settlement of the pargana in 1907. (The bahal land was about one-thirtieth of the acreage acquired and in Banerji's case was 74 and 1'64 acres of first and second class bahal respectively). Mr. Scroope took 24 maunds per acre to be 8½ maunds per bigha or about 4½ maunds net deducting half as cultivation expenses. Allowing a selling price of Rs. 2-4-0 per maund the annual profit worked out to Rs. 9-8-0 and after deducting Re. 1 as rent he held the annual net profits per bigha to be Rs. 8-8-0. Allowing 15 years' purchase he assessed Rs. 120 as the value per bigha of first class bahal. In the present case the Judge found an error in Mr. Scroope's calculation since 24 maunds of produce per acre would be 10'232 maunds per Dhalbhum bigha and not 8'47 as worked up by Mr. Scroope. The appellants further claimed that cost of cultivation should be one-third and the number of years' purchase should be 20; but the Judge refused to give effect to the claim and further held that Rs. 2-4-0 was the correct selling rate per maund. He esti-

mated the annual net profits at Rs. 10 per Dhalbhum bigha on the basis of 5 maunds, worth about Rs. 11-4-0, under deduction of Re. 1 for rent, and allowed fifteen years' purchase. That would give a rate of Rs. 150 per bigha at Jamshedpur instead of Rs. 120 allowed by Mr. Scroope. He went on:

"It is impossible to estimate the value with accuracy, and all we can do is to attempt a fair degree of approximation. There ought to be some difference between the value of lands near Jamshedpur and those near Ghatsila. I think an all round increase of 25 per cent over the rates allowed by the Land Acquisition Deputy Collector would very fairly compensate the objectors."

With regard to trees, he set out that no argument had been put forward and he considered the claim in respect of the value of tanks to be groundless.

With the increase of 25 per cent on Rs. 3,833-1-7 the value of the land, and the additional compensation there was a decree in favour of Banerji for Rs. 6,530; but in view of his claim being extravagant he was directed to pay Rs. 250 as part of the Collector's cost. The valuation of his appeal appears to show that he contests the decree so far as it is adverse to his original claim.

Sasadhar Mukherji's compensation was increased to Rs. 2,379-8-9 including trees, and in view of the extravagance of his claims he was directed to pay Rs. 200

as Collector's costs. Sasadhar Mukherji values his appeal at Rs. 1,654-6-6 only, apparently including the costs of the Court below.

The Government Pleader has strenuously pressed the plea under S. 25 (2) and has specially relied upon the decision in *Narain Dat v. Superintendent of Dehra Dun* (1). It is convenient however to deal first with the question of valuation.

On behalf of Banerji Mr. S. M. Mullick does not assail the measurements and but lightly challenged the classification of six plots, contends that the value of straw ought to be added in and refers to the valuation of mahua trees and to the tanks. His main objection however is that the rate of awal bahal should be Rs. 150 per Dhalbhum bigha or Rs. 358 per acre instead of Rs. 300 as allowed by the Court below with proportionate increase of valuation in the other classes of land, and to obtain this result he challenges the ingredients of the calculation of value in respect of number of years purchase, cost of cultivation, selling rate, non-allowance of straw and omission of fractions. (His Lordship then considered the objections as to classification of land, trees and alleged tanks which were lightly pressed, and proceeded:) Mr. Mullick therefore would follow the method evolved by Mr. Scroope with the correction made by the Land Acquisition Judge, but with the following modifications: that the cost of cultivation should be one-third instead of half, that the multiplier should be 20 years, the selling price Rs. 3, the price of straw should be added and the fractions be considered. For the Secretary of State each individual point is contested and it is also urged that the actual valuation already evolved by this method is not only adequate but excessive. Mr. Scroope's rate (with allowance for difference of valuation) has been allowed in subsequent land acquisition cases near Maubhandar, the only relevant private rate will not help appellants, while the purchase by Banerji at rent-sale for Rs. 16 of Binode Tanti's holding, the area of which is 16 bighas including 2 bighas 17 kathas gora, and the purchase by Mukherji of Haradhan's holding of 37 bighas for Rs. 81, definitely indicate that very low values indeed obtain locally even if the latter holding were adjudged to be gora only.

(1) A.I.R. 1914 All. 445=37 All. 69=26 I.C. 795.

As to the cost of cultivation and number of years purchase, it is urged that in most of the important decisions the figure of one-third has been taken and the number of years purchase at twenty. But many of the instances relate to pre-war times and to conditions in Bihar or Bengal and nothing is more unwise or indeed indefensible than to apply the analogy of these regions to conditions in Chota Nagpur. Mr. Scroope points out:

"One has to make allowances for the good and bad years, so 20 years' purchase of the annual value of a normal crop would be too high; besides the present rate of interest hardly justifies it. I therefore take 15 years as the multiplier."

He pointed out that cost of cultivation "is usually reckoned as half of the produce" and the Land Acquisition Judge states that

"it is common knowledge that cultivation expenses are usually taken at half the gross produce."

He also sets out "that though the number of years purchase taken in reported cases is often twenty that would hardly afford us any ground for determining the value of Dhalbhum lands."

Having occupied the same position as these two Judges both before and after the war (in 1924-25) and having knowledge of Singbhum from 1906 to 1925, I am in a position to endorse their views. Furthermore, it is clear that the cost of labour in the neighbourhood has gone up enormously and that interest was in 1925 about 6 per cent in Government securities. In short the estimate of cultivation expenses at half the gross produce over a period of years is by no means even high and the oral evidence to the contrary cannot be accepted. My own view is that in the area in question 15 years' purchase errs if at all on the side of excess having regard to conditions of tenancy, the limited right of sale which affected the value to the raiyat, lack of demand and several other adverse considerations, and cannot bear enhancement in this or similar cases. In any event appellants have entirely failed to displace the view of the Court below on these points.

The selling price allowed is Rs. 2-4-0 per maund and Rs. 3 is claimed. So also (witness 6 though more exaggerated estimates are given by other witnesses) Mr. Scroope took the figure from the Bihar and Orissa Gazette for Ranchi at the date of acquisition in August 1918 and Ranchi was then the provincial headquarters where prices are notoriously over high.

A selling price of Rs. 4.8-0 per maund for rice is an extravagant suggestion in respect of a jungle village like Maubhandar in 1925. It is one thing to sell retail in half-seers at this rate and a vastly different matter to sell large quantities wholesale in an out of the way jungle village. And general prices were falling. There is clearly no reason for disturbing the valuation made by the learned Judge in this regard which is high.

As regards the claim to the inclusion of straw in the valuation, this is an entirely new point based upon a stray statement of a single witness in his evidence that each maund of paddy represents straw worth five annas. It was not mentioned in the Court below and it is not even set out in the grounds of appeal. Now though in arriving at the annual value to the raiyat straw would undoubtedly be an element to be taken into account like any other product what has always been done and rightly in a case of this kind is to take a broad view of the position. Absolute accuracy is not attainable. But in fact the grain and straw are taken together and represented by the figure Rupees 2-4-0 per maund. (The statement that the straw appertaining to a maund of paddy is worth five annas is in any event an egregious over-estimate.) The learned Judge arrived at what he considered "very fair compensation" by an all-round increase of 25 per cent which brought the rates per Dhalbhum bigha up to the very high rate of Rs. 125-6-0.

Then as to calculation: it is suggested that not Rs. 10 but Rs. 10,232 should be taken into account and that Re. 1-4-0 should not have been struck off against a rent estimated at Re. 1. As to the rent, the sum of Rs. 1-4-0 would in 1925 be by no means excessive or even adequate for first class bahal as is clear from the fact that the relative rate for gora would then be only one and a quarter annas. The actual deduction is obviously quite inadequate. In taking broad views the plus and the minus generally cancel out. The Court below desired an approximate on which is all that is attainable and was right in striking off the decimal. But in any event in allowing 125 per cent on $8\frac{1}{4}$ maunds, the Court actually allowed $10\frac{5}{16}$ or more than 10.232 maunds. In my judgment the appellants have completely failed to dislodge the award and to show that the decision in appeal is

wrong and in fact the compensation so far from being inadequate would appear rather to err and even considerably on the side of excess.

Sasadhar Mukherjee did not go into the witness-box and in his appeal no separate argument was addressed to the Court on his behalf.

It remains to be added that the oral evidence on behalf of the appellants is not at all reliable, being of the "eyewash" and exaggerated type so familiar in references where the amount of compensation is contested. In the trial Court no reliance was placed by the objector on portions of it and nowhere does it impress. As there is no ground for interfering with the award even on the merits, the appeals fail.

It behoves one to say something of the plea which has been argued, that S. 25 (2) of the Act is a bar to further enhancement of the award in appeal. No cross-appeal has been preferred by the Secretary of State, but reliance is placed upon the decision in *Narain Dat v. Superintendent of Dehra Dun* (1) for the proposition that the respondent is entitled in appeal to resist further enhancement of the award on the ground that the statute prohibits any enhancement including that already allowed by the Court. The decision certainly supports the proposition. But Mr. Mullick urges that it is wrong and cites *Sri Ranga v. Srinivasa* (2) which is apparently accepted by Mulla in his commentary on O. 41, R. 22 (1), Civil P. C. But the Allahabad decision is in point and even if the Madras decisions were not otherwise distinguishable, there is serious doubt whether the expression "support the decree" which is used in the rule merely means "support the decision" an expression which might equally readily have been used by the legislature and does not also permit the respondent to show by reference to a ground decided against him in the Court below that the appellant has at least secured by the decree in controversy as much as he is, if not more than he is, entitled to. I do not think that it is correct to describe the plea as a challenge to the decree rather than support of it. It seems to me that O. 41, R. 22 permits the respondent to avail himself of every plea which he took in the Court below. The Govern-

(2) A. I. R. 1927 Mad. 801=104 I. C. 472=50 Mad. 866.

ment Pleader admits that some of the papers relating to the plea have not been printed, but the plea is clearly open to him on the basis that he accepts the description and view of them set out by the Court below, and he claims that even on that basis his plea is bound to succeed.

Section 25 (2) lays down that when the applicant has refused to make any claim to compensation pursuant to any notice given under S. 9 or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector. The first answer to this plea in bar was that such a claim to compensation had actually been made; but that has been negatived and the decision has not been contested in appeal. Sub-S. (2) therefore applies unless the omission to make the claim was with sufficient reason. The Government Pleader contends that the Judge erroneously allowed that the objector had omitted with sufficient reason to make his claim under S. 9. The question is whether the Judge was in error.

The scheme for the acquisition of land in Maubhandar originally notified in 1923 was for some reason abandoned. The preliminary notification under S. 4 under which the acquisition took place was published on 13th May 1925 and demarcation under S. 8 was made. The declaration under S. 6 made on 11th November described the area which it was proposed to acquire in that village as bounded on the north by the Bengal-Nagpur Railway; on the east by the nala Hatijabara Khal, on the south by the river Subarnarekha; and on the west by a straight line drawn at right angles at a point where the boundary line between the villages Maubhandar and Kitadih crosses the railway line to meet the river Subarnarekha. As usual it was stated that a plan of the land might be inspected at the office of the Deputy Commissioner of Singbhum. A general notice under S. 9 (1) was issued on 4th December 1925 and was served on 6th of that month, a few signatures on the back of it being however dated 8th December. It called upon persons interested to appear before the land acquisition officer at Purulia on 22nd December and to state their claims to compensation and objections to measurements made under S. 8. It however did not set out the boundaries in the space provided for

them. Sub-S. (2) requires that the notice shall state the particulars of the land needed and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than 15 days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under S. 8. On 21st December Banerjee appeared and preferred an objection as to classification and measurement. Under sub-S. (3) the Collector shall serve notice to the same effect on the occupier (if any) of the land and on all such persons known or believed to be interested therein or to be entitled to act for persons so interested, residing within the district. In the special notice issued on 14th June 1926 addressed to Banerjee in Case No. 180 the date which was 12th July was left blank and the place which was Ghatsila was incorrectly stated as Purulia.

Some of the plots were to be partially acquired, but only the pots and not the portions were indicated in the notice. Plot 667 was apparently a mistake perhaps for plot 467 there being no plot 667. Admittedly Banerji guessed from the other notices served upon him what the correct time and place of appearance was and in point of fact he entered appearance through one Gaur Chandra Sen, his agent. Gaur produced certain papers of Banerjee and others which the land acquisition officer inspected and apparently also produced the papers of Mukherji. The land acquisition officer stoutly denied that any amount was named before him and it is found that the agent filed no written claim to compensation and also made no verbal statement as to the value of Banerji's interests or the amount and particulars of Banerji's claim to compensation for such interests and in short failed to comply with the general and special notice. On the following day Banerji saw the land acquisition officer and signed the order sheet but made no claim. I accept the view of the Court below that no claim as required by the notice under S. 9 was made by the objectors.

It is clear that there was no defect in the special notice to Mukherjee and that up to this date he certainly had not sufficient reason for omitting to disclose his claim.

On 12th July the land acquisition officer looked into the papers produced before him and visited the area proposed to be acquired. His testimony is that he made inquiry under S. 11 at Ghatsila, that it was not a fact that he gave time to Gaur Babu or Gokul Babu (Banerji) to put in their claim by 11th August which was on the contrary fixed as the date for making the award. Then he stated :

"I went to the spot five or seven times. I went also on 12th July and verified the important classifications of land, existence of houses, tanks and trees standing on the acquired area I assessed the rates for different classes of lands on the basis of Mr. Scroope's judgment in connexion with the acquisition for the 'Greater extension of Jamshedpur.' I did so under instructions from the Deputy Commissioner The tenants were called and their khatians were compared with my khatians. The note was written by my clerk at my dictation at the dak bungalow. The order sheet was also written there at my dictation. 'Held inquiry under S. 11, Limitation Act,' was written after the order was written out. After it was read out I found the omission and it was written then and there."

Again he deposed :

"As there was no claim I did not inquire into the question of valuation It was no part of my inquiry to ask about valuation as there was no claim in regard to it."

Again he states that subject to consultation with the Deputy Commissioner under the rules (because the award was expected to exceed Rs. 10,000) and subject to the deposit of the money by the company into the treasury, he adjourned the case in the words, "To 11th August," at the end of his order of 12th July to 11th August as the date for making the award. There cannot be the slightest hesitation in accepting his evidence and in particular that the words, "Held inquiry under S. 11, Limitation Act" were inserted in the order-sheet at the time and on the occasion which he describes. On 14th July he wrote to the requisitioning company inquiring if any portion of the land was urgently required and received the reply that the company did not desire possession in the course of the year whereupon he adjourned the case sine die and directed that the parties concerned including the objectors be informed. On 29th March 1927 the Deputy Commissioner directed him to complete

the valuation and he did so and placed the draft award before the Deputy Commissioner at Chaibassa on 8th April and made the award at Ghatsila on the following day.

The learned Judge held that "sufficient cause" was constituted by the facts set out above, that the appellants had not omitted without sufficient reason to make the claim for compensation set out in S. 9 (2) and that therefore they did not fall within the purview of S. 25 (2) so as to be debarred from securing a favourable order on a reference to the Court. He held (A) that in the case of Banerjee the pre-requisite for applying the provision did not exist, namely, proper notice because: (1) no date was given and the place was incorrectly given in the special notice in case 180 ; (2) the portions to be acquired from certain plots were not indicated and plot 667 which had no existence was inserted ; (3) the general notice was not self contained because it did not specify the boundaries and moreover it was not served within 15 clear days ; and (4) that there was no inquiry under S. 11 as to classification or measurement contested by Banerjee in his petition of 21st December : and (B) that in both cases there was no inquiry under S. 11 as to valuation, the inquiry being incomplete

"in that it was not directed towards finding out the valuation so as to enable him to make an award as required by S. 11."

He held that it was the duty of the land acquisition officer to try to find out in the presence of the appellants what the value of the land was likely to be and that as he put off the cases from 12th July without specifying the object of the adjournment and as under S. 13 the inquiry under S. 11 could be adjourned and as from the fact that

"there was no inquiry as to valuation and other matters, the objectors might (sic) have been under a reasonable impression that the inquiry under S. 11 was adjourned till 11th August,"

before which date the case was postponed sine die and subsequent proceedings took place behind their back, there was here also sufficient reason under S. 25 (3) for the omission on the part of each of the appellants to make his claim in pursuance of the notice under S. 9. The Government Pleader contends that the real point has been lost sight of by the learned Judge and certainly the attention of the learned Judge does not appear to

have been directed to the two decisions : *Ezara v. Secy. of State* (3).

As to (A) the point is not merely whether the notice given under S. 9, pursuant to which Banerjee was bound to make a claim, was in all respects full and legal, but whether the defects in it constituted sufficient reason for omitting to make a claim. None of the items in (A) can be said to constitute such reason nor can all of them together.

It is at once obvious in respect of the general notice that it was not insufficient in law merely because it did not give Banerjee fifteen clear days' notice of the date fixed. The statute sets out only that the date must not be earlier than fifteen days after the service of the notice. The notice was served on the 8th and the date was the 23rd or exactly 15 days after the service was acknowledged. That was a compliance with the statute. The Judge erroneously took the expression to be "fifteen clear days" in which case it would be necessary to exclude both terminal days.

Again the failure to give the boundaries in that notice was immaterial in view of the notification, declaration, demarcation and the fact that the measurements were not contested on 12th July and were not contested on the reference. "The particulars" given adequately complied with the statute and the absence of boundaries manifestly occasioned no prejudice. Then as to the petition of 21st December there was in fact an inquiry as to classification, and the reason why there was none as to measurement was that the objection had by 12th July evaporated.

As to the special notice to Banerji on which stress is mainly laid, it is true that it was defective as to date and place, but admittedly he put in appearance at the time and place meant, and all idea of prejudice is an afterthought. The usual steps were taken and it is obvious that the true reason why a claim was not made then was as usual that the recipients of compensation were lying low on the offchance of getting a really high award in their favour. In my opinion they refrained deliberately from naming a figure and did not omit to put in a claim owing to any defect in the notice or anything else connected with the notice. As the lands had long been demarcated it made no difference that when only a por-

tion of a survey plot was to be acquired the area of the portion (itself a numbered land acquisition plot) was not mentioned. The evidence shows that the appellants knew what land was being taken. And as has been said there was no contest as to measurements. With the demarcation it could make no difference that the Bihari Amin writes badly Bengali figures, the first of which can be read as "6" when Banerjee must have seen by elimination that it was a slip for the only remaining plot, the second and third figures of whose number were "67." And in fact it made no difference. The preliminary notification also contained a sufficient description.

Theoretically the western boundary might be adjudged vague, but the demarcation could leave no room for doubt on the mind of anybody viewing the land and in fact there was no doubt in the objector's mind. The point is not whether there were mistakes but whether they constituted sufficient reason for omission to make a claim. In my opinion they could not constitute any reason and in fact they were not the reasons why Banerji did not make a claim.

As to (B) the statement in the petition of reference may first be quoted :

"That when a notice under sub-S. (3), S. 9, was served on your petitioner he appeared before your honour and was granted time and your petitioner intended to file written detailed objections as to the amount of compensation on the adjourned date, but on the adjourned date your petitioner was informed by a notice that the matter was adjourned sine die, and accordingly no detailed written objection as to the valuation, etc., could be filed on behalf of the petitioner."

But it is clearly established that the appellant was not granted time, and that neither he nor anyone else asked for time. Further it cannot be believed that he intended to file written detailed objection on "the adjourned date" as to the amount of compensation. It is not even alleged that the objection was ready to be filed after as he states he received on the adjourned date a notice that the matter was adjourned sine die. All these statements are simply falsehoods to keep the matter outside S. 25 (2). Further the Court below only thought that the failure of the land acquisition officer to make an inquiry as to valuation on 12th July might have led the appellants to think that he had adjourned his inquiry without a finding. "Might have led them to think," is of course not a sufficient finding. The view is in any event without

(3) [1903] 30 Cal. 36=7 C. W. N. 249.

any justification and in fact the obvious truth is that nothing either did or could lead them so to think. The learned Judge appears to consider that the proceeding under S. 11 is a judicial proceeding. On the decisions cited above that is not so. I hold that the proceedings of the land acquisition officer on 12th July were in circumstances a full compliance with the provisions of S. 11. Obviously there was no necessity for further inquiry with regard to the measurement which has never been seriously contested. Though classification was not objected to the land acquisition officer actually made an adequate inquiry. As to valuation, the Collector is not limited to evidence taken before the opposite party or disclosed at the inquiry. It was obvious to all parties at that time that in the circumstances of the case the only evidence available related to previous awards in land acquisition cases. The view cannot be supported that he was bound .

"to try to find out in the presence of the appellants what the value of the lands would be likely to be"

in order to :

"apprise them as to the amounts they were roughly to get as compensation."

They were called upon to put in their claim in order to help him to come to a decision, and when they failed to assist him in this way he was certainly not bound to make any further inquiry in their presence. It is incredible either that the case was postponed to 11th August for any other purpose than for the award, that is to say, the land acquisition officer considered opinion as to the price he should offer the owners of the land under acquisition, or that anyone was under any such impression. Indeed two days after the hearing the land acquisition officer inquired from the company whether immediate possession was desired. That fact alone would show that he then considered himself to be in a position to deliver possession at once if it was wanted by the requisitioning company. In any case even if the inquiry was postponed, it does not follow that the date for filing the claim was extended. The appellants would not be entitled to postpone their claim because of a postponement or continuance of the inquiry. As already mentioned neither was an adjournment asked for, nor is there any indication that the question of putting in a definite claim ever engaged the attention

of the appellants. (B) does not either suffice or help to save the appellants from the bar under S. 25 (2). Thus there can be no doubt at all that Mukherji has omitted without sufficient reason to make his claim.

I am also of opinion that in spite of the defect in the special notice Banerji is in the same position.

The plea of the Government Pleader under S. 25 (2) is therefore sound, and if the appeal had not already failed on the merits, it would have failed under that provision.

I would dismiss these appeals with costs.

Fazl Ali, J.—I agree that these appeals should be dismissed with costs. Both the land acquisition officer and the District Judge have adopted Mr. Scroope's method of valuing the lands and the award of the land acquisition officer has been modified by the District Judge merely because it was found that Mr. Scroope had made a slight error in converting the yield per acre into the yield per local bigha. The learned advocate appearing for the appellant in the Court below did not object to Mr. Scroope's method being employed in this case nor was there any serious objection raised in this Court on that score. Once therefore it is found that the main principle on which the lands have been valued is correct, it is neither usual nor proper for this Court to lightly disturb the conclusion arrived at by the Courts which must be assumed to be familiar with the local conditions, merely because more than one view is possible as to what are mere details. For instance, there has been much argument before us as to whether one-third or half of the produce should be taken to represent the cost of cultivation and whether the net annual proceeds should be multiplied by 15 or 20 in order to get the capital value of the land. The learned District Judge as well as the land acquisition officer have held that half the produce should be deducted as representing the cost of cultivation and that fifteen times the annual proceeds should be taken as the value of the land. My learned brother who has himself very large experience of the conditions of Chota Nagpur has dealt with the matter very fully and has shown that the District Judge's valuation should not be disturbed and I fully agree with his view in this matter.

As the appeals fail on the merits I reserve my opinion on the second important question which was urged before us, namely, whether under S. 25, Cl. (2), the appellants are debarred from questioning the sufficiency of the award. I wish to express no final opinion, because on the one hand I fully realize the force of what my learned brother has said on this point in his judgment and on the other hand it appears to me that at least in the case of Gokul Krishna Banerjee there is a good deal to be said in favour of the view that S. 25, Cl. (2) will not be a bar to his claiming a higher amount than what has been awarded to him. The notice that was served upon him under S. 9, Land Acquisition Act, was defective in certain very material particulars and we cannot also overlook the petition filed by him on 21st December 1925 in which he seems to suggest that he was not fully aware of what land were being acquired. It is however unnecessary for me to pursue the matter because, as I have already said, the appeal fails on the merits.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1932 Patna 143

MACPHERSON AND FAZL ALI, JJ.

Supan Sahu—Plaintiff—Appellant.

v.

Tulsi Singh—Defendant—Respondent.

Appeal No. 140 of 1929, Decided on 21st May 1931, against original decree of Sub-Judge, Palamau, D/- 25th February 1929.

Chota Nagpur Encumbered Estates Act (1876), S. 12-A—Sale in execution of money decree is not void when proprietor falls within S. 12-A, but not within S. 12-A (1) to (5).

Section 12-A (1) falls into two parts. Sub-Ss. (1) to (5), apply to the owner who was also the person who was the holder when the application under S. 2 to take the property under management was made, whereas sub-S. (6) applies to all owners to whom the property is restored, whether they fall under sub-Ss. (1) to (5) or not, and so the enactment is retained in respect of all owners to whom an encumbered estate is released. A sale in execution of a money decree is void under S. 12-A when the property sold is that of a person covered by S. 12-A (1). But it is not so when the proprietor falls within S. 12-A, but not within S. 12-A (1) to (5): *A. I. R. 1931 Pat. 364, Foll.* [P 144 C 2]

Ragho Saran Lal—for Appellant.

S. Saran and *C. P. Sinha*—for Respondent.

Macpherson, J.—This appeal is preferred by Supan Sahu, the plaintiff in a suit instituted in the Court of the Sub-

ordinate Judge of Palamau, substantially for a declaration that the decree obtained by defendant 1 in Suit No. 2 of 1926 is inoperative and the sale on 21st March 1928, in execution thereof of property appertaining to the Dabra Estate of the plaintiff is void as such property was not saleable by reason of the provisions of S. 12-A, Chota Nagpur Encumbered Estates Act, 1876 (hereinafter called the Act). It is extremely difficult to infer from the plaint itself which is in the worst Daltonganj form and regardless of all rules of pleading what the real object of the litigation was. But it is admitted by the learned advocate for the appellant that the gist of the claim is that the sale of plaintiff's 10 annas share in Juro and 11½ pies out of 16 annas in Ramanand Dabra is void under S. 12-A of the Act.

The Subordinate Judge dismissed the suit which was decided on documentary evidence only. He held that no disqualification attached to the plaintiff under S. 12-A of the Act, and that the suit was barred under the principles of *res judicata*.

In appeal it is urged that at least the second finding is wrong and it is also contended, though in the end somewhat feebly, that the decision on the first point also is erroneous. It is clear that if the first finding is correct, the suit can have no basis.

The estate of Jhumak Sahu, father of the plaintiff-appellant, was taken under the Act by notification dated 9th May 1906, which definitely set out that the management was vested in Babu Surya Kumar Som, First Manager of the Encumbered Estates, Palamau, of the undermentioned immovable property of Jhumak Sahu of Dabra which property comprised Juro 16 annas, Ramanand Dabra 13 annas and shares in four other villages. The estate was designated the Dabra Encumbered Estate.

On the death of Jhumak Sahu in or before 1910 the Manager of the Encumbered Estates on behalf of appellant and Hira and Jawahar, sons of the deceased, obtained mutation of names in respect of Ramanand Dabra not only for the share of the deceased but also for a small share previously in the names of his sons. A further notification in 1913 under the provisions of S. 20 vested the management of the Dabra Encumbered Estate in the Manager of the Encumbered Estates

who had succeeded Babu S. K. Som, the names of the proprietors being given as Supan Sahu and Hira Sahu, sons of Jhumak Sahu, deceased proprietor apparently after the death of Jawahar.

On 2nd September 1918, was published a notification releasing the estate from management which sets out that the Dabra Estate, the property of the late Jhumak Sahu of which Babu Surya Kumar Som was first appointed manager and subsequently Mr. P. C. Mazumdar, had been released from management under the Act and restored to the possession of the present proprietors Supan Sahu and Hira Sahu and proceeds :

"The provisions of the Act, except S. 12-A, have ceased to apply to the said property from the afternoon of 6th August 1918."

Subsequent to the release there was, it is stated at the Bar a partition among the Sahus whereby the share of Supan Sahu came to consist of the property which is now in contest.

After the release Supan Sahu borrowed money from defendant 1 who eventually in 1928 in Suit No. 2 of 1926 secured a decree against him for nearly Rs. 8,000. In execution of the decree the property mentioned was sold and was purchased by the decree-holder. Thus the present suit is substantially for a declaration that in view of S. 12-A (1) (a) and (3) no such sale could be held by the civil Court in execution of a decree for money. It is conceded that in the suit mentioned several of the points now taken were negatived and in particular that it was expressly held that the plaintiff could legally advance money to defendant 1 without the permission of the Commissioner.

Now Mr. Raghosaran points out that in the notification releasing the estate the provisions of S. 12-A are retained and he relies on sub-Ss. (1) and (3) which run :

"(1) When the possession and enjoyment of property is restored under the circumstances mentioned in Cl. 1 or Cl. 3, S. 12, to the person who was the holder of such property when the application under S. 2 was made, such person shall not be competent, without the previous sanction of the Commissioner.

(a) to alienate such property, or any part thereof, in any way; or

(b) to create any charge thereon extending beyond his lifetime ;

(3) every alienation and charge made or attempted in contravention of sub-S. (1) shall be void."

Now the retention of S. 12-A, which

continues disabilities after restoration of the property to the owner, will not show that sub-Ss. (1) and (3) are applicable to the persons to whom the estate is released. That enactment falls into two parts. Sub-Ss. (1) to (5) apply to the owner who was also the person who was the holder when the application under S. 2 to take the property under management was made, whereas sub-S. (6) applies to all owners to whom the property is restored, whether they fall under sub-Ss. (1) to (5) or not, and so the enactment is retained in respect of all owners to whom an encumbered estate is released. It has indeed been held in *Khit Narain Sahi v. Surju Seth* (1) that a sale in execution of a money decree is void under S. 12-A when the property sold is that of a person covered by S. 12-A (1). But it is not so when the proprietor falls within S. 12-A, but not within S. 12-A (1) to (5). Accordingly it is manifest and the learned advocate is constrained to admit that he cannot succeed unless he shows that the appellant falls under S. 12-A (1) as being "the person who was the holder of the property when the application under S. 2 was made."

But the endeavour to establish that the appellant Supan Sahu was the "holder" when the estate was brought under management is attended with overwhelming difficulty in view of the notification of 1906. Little can be pointed to except two documents, by the first of which Supan Sahu and Hira Sahu, sons of Jhumak Sahu, purchased 4 pies of Ramanand Dabra on 28th January 1904, and Jawahar Sahu, another son, purchased 2 pies on 30th January 1904, and in respect of these acquisitions it is said that they were included in the share of Ramanand Dabra which was taken under management in the name of Jhumak Sahu in 1906. But this would only go to show that the purchases were really benami in the names of Jhumak's sons and for the benefit of the father. Again the fact that the names of the sons were substituted on the death of the father would go to show that not they but he was the holder. The inference from the mutation proceedings in 1911 is the same. Manifestly the appellant has entirely failed to show that he was the holder in 1906.

(1) A. I. R. 1931 Pat, 364 = 132 I. C. 868 = 10 Pat. 582.

It is faintly submitted that S. 2 is quite sufficient to include the heirs. But a perusal of the provision shows that the contrary is the case.

As the appellant does not fall within S. 124-A (1) it was competent to him after the release of the Dabra Estate to borrow not only money but even on mortgage without the sanction of the Commissioner, and there was nothing to prevent the decree-holder from suing on his bond and from selling the property of the appellant in execution of his decree. Admittedly Suit No. 2 of 1926 did not come within sub-S. (6).

This appeal is entirely without merits and must be dismissed with costs without calling upon the respondent.

Fazl Ali, J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 145

WORT AND MOHAMMAD NOOR, JJ.

Ram Prasad Ojha and others—Defendants—Appellants.

v.

Bakshi Bindeshwari Prasad and others Plaintiffs—Respondents.

Second Appeal No. 455 of 1929, Decided on 25th June 1931, against decision of Dist. Judge, Shahabad, D/- 11th December 1928.

(a) **Limitation Act (1908), Arts. 138 and 144**—*A* purchasing property in 1908 in execution of mortgage decree obtained in 1888—Writ of delivery of possession served in 1915—*B* purchasing same property in 1890 in execution of simple money decree—Suit for possession by *A* is governed by Art. 144 and not by Art. 138—Limitation held started from 1915.

A purchased certain property in 1908 in an auction sale held in execution of a mortgage decree obtained by him in 1888. The sale was confirmed in 1912, and the writ of delivery of possession served in 1915. In the meantime *B* had purchased the same property in 1890 in execution of a simple money decree. *A* being resisted in taking possession of the property by *B* brought a suit in 1927 claiming a declaration of the title and possession of the property.

Held : that Art. 144 and not Art. 138 applied to the case. The possession of *B* was adverse from the date of the delivery of possession to *A* i. e., in 1915, when the writ of delivery of possession was served and not from 1908 nor from 1912: *A. I. R. 1922 Cal. 176* and *A. I. R. 1930 Cal. 15, Foll. ; 21 All. 269, not Foll.* [P 146 C 2]

(b) **Limitation Act (1908), Art. 144**—**Adverse possession**—Party alleging must prove acquisition of title by adverse possession, at time of action.

In a case governed by Art. 144, the onus is on the party alleging adverse possession to show

that it had got a title at the time of the action by adverse possession. [P 146 C 1]

(c) **Limitation Act (1908), Art. 138**—**Art. 138 applies when possession is not delivered by Court.**

Article 138 applies to a case in which there has been no delivery of possession by the executing Court as contemplated by O. 21, R. 95 or R. 96, Civil P. C. [P 147 C 1]

(d) **Civil P. C. (1908), O. 21, Rr. 35, 36, 95, and 96**—Code prescribes two modes of delivery of possession based on nature of property concerned.

(Per *Mohammad Noor, J.*)—The Civil Procedure Code prescribes two modes of delivery of possession based upon the nature of the property concerned. The Code does not prescribe that in respect of a particular property there can be two modes of giving possession either to a decree-holder or to an auction-purchaser, one "symbolical" and the other "actual."

[P 147 C 2]

Guru Saran Prasad, S. S. Prasad and Nawal Kishore Prasad II—for Appellants.

Shiveshwar Dayal, Gurdyal Sahay and D. N. Varma—for Respondents.

Wort, J.—This is the defendant's appeal in an action in which the plaintiff claimed a declaration of title and possession of a certain property, details of which it is unnecessary to state.

The predecessor-in-title of the plaintiff executed a certain mortgage deed in the year 1883; an action was brought on this mortgage and a decree was obtained. There was then an appeal by one of the defendants; the appeal was dismissed, the plaintiff succeeded in getting a decree for costs, and, in execution of that decree, the property, which is the subject-matter of dispute, was purchased by the present defendants' predecessor-in-title. In the year 1886 other mortgages were executed of this property and ultimately, without stating the details of the litigation, the predecessor-in-title of the plaintiffs obtained a mortgage decree and purchased the property in dispute in that mortgage decree on 12th December 1908. In March of 1912 the sale was confirmed. On 22nd January 1915 they took out a writ of delivery of possession, and, it is stated, were given possession. In the course of this litigation this possession has been described as symbolical possession. By that is meant, I presume, constructive possession. But in the view that I take of the case it is quite irrelevant to discuss that matter.

Now two facts are outstanding: one that the property which is the subject-matter of this dispute was purchased by the defendants in a money decree: second-

ly the same property was purchased by the predecessor-in-title of the plaintiffs in a mortgage decree. The result therefore is that the plaintiffs have a superior title to that of the defendants.

In 1927 this action was brought by the plaintiffs and has been disposed of by the trial Court by coming to the conclusion that the action was barred by limitation.

The learned District Judge dealt with the case as a case coming under Art. 142. He has stated in the course of his judgment that the plaintiffs obtained possession in 1915, that they were subsequently dispossessed, and therefore when they brought their action in the year 1927 they were clearly in time, and in the result he has given the plaintiffs a decree.

Now the conclusion at which the learned District Judge has arrived was in my judgment, right, but I do not altogether agree with the reasoning by which he has arrived at that decision. The action was treated, as I have already stated, as an action under Art. 142. Whatever the evidence in the case may have been when the plaint in the action is analyzed, it is quite clear that the contention of the plaintiffs was not that they had got possession and had been subsequently dispossessed but that they had failed to get possession from the defendants. That was their complaint.

It was suggested in the course of the argument that Art. 138, Lim. Act, applied. It was pointed out by my learned brother in the course of the argument that Art. 138 would appear to apply to a case in which a decree-holder having purchased a property had failed to take advantage of the procedure under the Civil Procedure Code for the purpose of obtaining possession when the judgment-debtor was in possession, and in those circumstances he brings an action to obtain possession which he might have obtained under the Civil Procedure Code had he been so minded. In my judgment that article does not apply to a case of this character. The article therefore remaining is Art. 144. No authority need be quoted for the proposition that in those circumstances it being a case under Art. 144, the onus was upon the defendants to show that they had got a title at the time of the action by adverse possession.

Now the only question therefore that really arises in this case is whether the adverse possession ran from 12th December 1908, the date of the sale or March 1912 when the sale was confirmed or 22nd January 1915 when the writ of delivery was taken out by the plaintiffs. Quite clearly it was not on 12th December 1908 which was merely the date of the sale, confirmation of the sale having taken place three years later as I have stated in 1912. The real competition is between the date of the confirmation of the sale in 1912 and the writ of delivery of possession in 1915.

Now quite apart from authority, it seems to me clear that in any sense of the word the title of the defendants cannot be said to be adverse until such a time arrived when the plaintiff attempted to enforce his rights under the sale. That clearly was in January 1915. Once having decided that point, the matter, in my judgment, becomes clear and the only conclusion at which I can arrive is that the learned District Judge was right in saying that the plaintiffs were within time when they brought their action in 1927.

I am of opinion therefore that the appeal should be dismissed with costs.

Mohammad Noor, J.—I agree that the appeal should be dismissed with costs. It is unnecessary to go into any details of the facts of the case which are very simple.

The plaintiffs sued for recovery of possession of the property in dispute basing their title on a purchase at an auction sale held in execution of a mortgage decree. The dates of various events leading to the sale and subsequently to the delivery of possession are rather important.

The mortgage decree in execution of which the sale relied upon by the plaintiffs was held was passed on 29th March 1888 and after a somewhat prolonged litigation it was confirmed by the High Court in 1903. The sale in execution thereof took place on 12th November 1908 and confirmed on 9th March 1912, the writ of delivery of possession was served on 21st January 1915. In the meantime the predecessor-in-interest of the defendants purchased this very property in execution of a simple money decree. The circumstances under which that decree was obtained have been described in the judgment of the Courts below and it is unnecessary for me to refer to them.

It is sufficient to say that the Court of first instance has held that the decree was a simple money decree and that finding was not challenged before the lower appellate Court nor before us. Therefore the question involved in this appeal resolves itself into a conflict between the two sales, one held in execution of a mortgage decree and another in execution of a simple money decree. The sale relied upon by the defendants took place in the year 1890 about two years after the mortgage decree was passed.

The learned advocate for the appellant has conceded that in ordinary circumstances he would have had no answer to the suit, the plaintiff's title being obviously a paramount one. But he contends that the suit was barred by limitation as it was instituted more than 12 years after the purchase. His main contention is that during the entire period, that is since the purchase of the plaintiff, up till the institution of the suit, the possession of the defendant was adverse to the plaintiff.

The first thing which we have to decide is as to which article of the Limitation Act applies to this case. It is obvious that Art. 133 has no application. That article applies to a suit instituted by an auction-purchaser against a judgment-debtor. In my judgment it applies to a case in which there has been no delivery of possession by the executing Court as contemplated by O. 21, Rr. 95 or 96, Civil P. C. The article to my mind which obviously applies to this case is Art. 144, as this is a suit for possession of immovable property or any interest therein not otherwise provided for in the Act. The period commences to run from the time when the possession of the defendant became adverse to the plaintiff. It is clear that no other article of the Limitation Act applies to such a suit and therefore of necessity the article that is applicable is Art. 144. Having come to this conclusion we have to see when the possession of the defendant became adverse. Was it when the plaintiffs purchased the property, or when the sale was confirmed, or was it when they went to take possession of the property armed with the writ issued by the Court?

The learned advocate has contended that as the possession directed by the Court to be given to the auction-purchaser was only a symbolical one, he not

being a party to the execution proceedings is not bound by that delivery of possession and that such a delivery of possession did not give a fresh start of limitation to the plaintiff.

The learned District Judge has noted conflict of decisions on account of a somewhat loose use of the expression "symbolical possession" which he calls a horrid and meaningless phrase. No doubt confusions have arisen on account of the misunderstanding of the words "symbolical" and "actual" possession, words not used in the Civil Procedure Code. The confusion is not however due to these words being used in judicial decisions but on account of their misappreciation and misapplication. The Civil Procedure Code prescribes two modes of delivery of possession based upon the nature of the property concerned. The Code does not prescribe that in respect of a particular property there can be two modes of giving possession, either to a decree-holder or to an auction-purchaser, one "symbolical" and the other "actual." The relevant rules for an auction purchaser are Rr. 95 and 96, O. 21, Civil P. C., corresponding to Ss. 318 and 319 of the old Code. Similar provision for giving possession to the decree-holder is contained in Rr. 35 and 36. These rules prescribe that if the property is in the occupation of the judgment-debtor or of some one on his behalf etc. etc., the possession shall be given if necessary by removing the judgment-debtor, etc., and placing the decree holder or the auction-purchaser in occupation of the same. On the other hand if the property is of such a nature that the judgment-debtor cannot be in actual occupation of it as for instance, property in the possession of a tenant, the only mode of giving possession is by proclaiming on the spot that the possession has been given to the decree-holder or auction-purchaser.

In some of the decisions of various High Courts the one mode of possession has been called "actual" and the other "symbolical." None of the cases lay down that there is such a thing as actual or symbolical delivery of possession irrespective of the nature of the property to be delivered. When it is said that symbolical possession is not binding upon a third party but actual possession is, it is only meant that when a decree-holder or an auction-purchaser has been put in actual occupation of the property every

body else has been ousted from it, and consequently dispossessed. This is an obvious fact and not a question of law. On the other hand if the Court simply proclaims that the decree-holder or auction-purchaser has been given possession but on account of the nature of the property they have not been placed in physical occupation of the property itself, such a delivery of possession can be binding only upon those who are parties to those proceedings or on those who claim through them. The difference, as I have said, is due to the nature of the property and not on account of the difference in the nature of possession. The question will always be not what was the mode of delivery of possession but who has in fact been ousted by it.

Now in this case we have to see if the delivery of possession relied upon by the plaintiffs was of such a nature as to amount in the eyes of the law to ouster of the defendant from the property itself.

From the dates I have given in the earlier part of this judgment it will appear that the purchase by the predecessor-in-interest of the defendants was after the passing of the decree in the mortgage suit, and obviously the case is covered by the doctrine of *lis pendens*.

The complaint of the learned advocate on behalf of the appellant that he was not a party to the mortgage suit has a simple answer. He could not have been a party to a suit which was finished before his purchase. I have already said that the decree was passed in 1888 and the purchase relied upon by the defendant was in the year 1890. Therefore his position is no better than that of the mortgagor; he obtained the right, title and interest of the mortgagor subsequent to the passing of the mortgage decree and therefore was bound by the decree, the sale and the delivery of possession.

Now when once the Court put the plaintiff's predecessor-in-interest in possession of the property and the defendant continued in possession of it in spite of this delivery of possession, it is then and then only that the possession of the defendant becomes adverse. The plaintiff could not have gone and taken possession of the property either at the sale or even after the confirmation of it unless the Court put him in possession and therefore in my opinion the possession of the defendant was adverse from the date of

the delivery of possession. The view of law I have taken is supported by the decision of *Janaki Nath v. Baikantha Nath* (1) and *Harasit Golder v. Jaladar Biswas* (2). No doubt a contrary view was taken in the case of *Narain Das v. Lalta Prasad* (3). But with respect to the learned Judges of the Allahabad High Court, I am of opinion, if I may say so, that the Calcutta cases were correctly decided and should be followed. This being the case the suit was within time.

R.M./R.K.

Appeal dismissed.

(1) A.I.R. 1922 Cal. 176=70 I.C. 602.

(2) A.I.R. 1930 Cal. 15=121 I.C. 407=56 Cal. 1130.

(3) [1899] 21 All. 269=(1899) A.W.N. 56.

A. I. R. 1932 Patna 148

WORT AND FAZL ALI, JJ.

Khantabala Debya and another — Appellants.

v.

Baijnath Marwari and others—Respondents.

Misc. Appeal No. 142 of 1929, Decided on 24th July 1931, against order of Sub-Judge, Dhanbad, D/. 13th June 1929.

Bengal Encumbered Estates Act (6 of 1876), Ss. 3 and 8—Mortgaged property taken over by Court of Wards—Debt secured by such mortgage is not mortgage debt—Jurisdiction to attach and sell this debt vests in Court within whose jurisdiction Manager of Court of Wards resides—Civil P. C. (1908), O. 21, R. 46—Jurisdiction.

A debt secured by a mortgage of property under the management of the Court of Wards should be attached and sold by the Court within whose jurisdiction the Manager of the Court of Wards resides and not by the Court in whose jurisdiction the mortgaged property is situated because what is attached and sold is not a mortgage debt but a right to receive payment from the said manager: 39 Cal. 104 and 4 Pat. L. J. 141, Rel. on. [P 149 C 2]

J. Chatterji and J. C. Sinha—for Appellants.

C. C. Das and J. M. Ghosh—for Respondents.

Wort, J.—This is an appeal from a decision of the Subordinate Judge of Dhanbad arising out of an application under O. 21, R. 90, Civil P. C. by the judgment debtor seeking to set aside an execution and sale of certain property in the following circumstances: The judgment-debtor was the mortgagee and the proprietor of an estate which was subject to the control of the Court of Wards under a vesting order made under the Encumbered Estates Act 6 of 1876. The mortgagee's share in the mortgage debt was a quarter of

2 annas 6 gandas. An attachment in the execution case and the execution case had taken place at Dhanbad. It is contended on behalf of the judgment-debtor, who is represented by Mr. Jyotirmoy Chatterji, that the Court at Dhanbad had no jurisdiction and that the only Court which had jurisdiction in the matter was the Court at Purulia. A further argument both before the lower Court and this Court is that there was material irregularity regarding the sale proclamation and further that damage had ensued by reason of the fact that the price which was obtained was much less than the true value of the debt.

The only substantial point is that relating to jurisdiction. It is not denied that if this was a mortgage debt then the Court at Dhanbad, in which the property which was the subject-matter of the mortgage bond was situated had jurisdiction, whereas, if it was not a mortgage debt, it is not seriously denied that the only Court which had jurisdiction was that at Purulia. For this proposition Mr. Chatterji relies upon the cases of *Begg Dunlop & Co. v. Jagannath Marwari* (1). This decision was followed by this Court in the case of *Bank of Bengal v. Sarat Ch. Mitra* (2). The only question therefore which we have to determine in this case was whether this was a mortgage debt or whether it was merely a right to receive such sums as the manager under the Encumbered Estates Act thought fit in justice and equity to pay to the creditor which was in this case, as I have already stated, the judgment-debtor. For the purpose of this point reference must be made to Act 6 of 1876. The first section which is material is S. 3 which provides:

"On the publication of an order under S. 2, the following consequences shall ensue: first, all proceedings which may then be pending in any civil Court in British India or in any Revenue Court in Bengal in respect of such debt or liabilities shall be barred; and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void."

Some reliance is placed by Mr. C. C. Das who appears on behalf of the respondents on S. 8 which provides:

"The Manager shall, in accordance with the rules to be made under this Act, determine the amount of all principal debts and liabilities justly due to the several creditors of the holder of the property, and to persons holding mortgages, charges or liens thereon, etc."

He relies, as I understand his argument

(1) [1912] 39 Cal. 104=11 I. C. 417.

(2) [1918] 4 Pat. L. J. 141=48 I. C. 943.

on this section for the purpose of supporting his argument that in spite of S. 3 the mortgage still subsists; in other words, it is still a mortgage debt and has also the incidents of a mortgage. The restoration of the property and the circumstances which give a right to the Commissioner to restore the property are set out in the earlier part of S. 12; and the penultimate clause of that section goes on to say:

"Where the holder of the property or his heir is so restored under the circumstances mentioned in Cl. 2 of this section, such restoration shall be notified in the Calcutta Gazette, and thereupon the proceedings, processes, executions and attachment mentioned in S. 3 (so far as they relate to debts and liabilities which the manager has not paid off or compromised), and the debts and liabilities barred by S. 7 shall be revived."

It is contended, as I have stated, on behalf of the respondents that although there is a reviver in the circumstances in which the attachment is discharged if I may use the expression, yet at the same time the mortgage with all its characteristics was alive throughout the period of attachment.

It seems to me the matter can be shortly tested in this way: Had it not been for the fact that the estate was the subject-matter of an order under Act 6 of 1876 there is no doubt, as I have indicated in the first part of my judgment that the Dhanbad Court had jurisdiction because what would have been attached would have been the right, title and interest of the mortgagee in the mortgaged property itself. What has been attached and what would be attached in the events which have happened, that is to say, the estate being under the Encumbered Estates Act, was not the right, title and interest of the mortgagee in the property itself but the right, whatever that may have been, to receive such payment as the manager of the encumbered estate would have thought fit in justice and equity to pay to the creditor, that is to say, to the judgment-debtor in this case. It seems to me therefore quite clear that the mortgaged property itself was not attached, that in the circumstances the rule which was laid down in the cases to which I have referred applied, and that therefore the Court which had jurisdiction in this matter was the Court where the judgment debtor himself resided, or in other words in this case, the manager under the Encumbered Estates Act, and that was the

Court at Purulia. In these circumstances it seems to me quite clear that the Court at Dhanbad had no jurisdiction.

The other questions which came up for determination by the Subordinate Judge in these circumstances do not arise. For these reasons, in my judgment this appeal should be allowed. This judgment governs only that property to which reference is now made, namely, the Pandra debt. The appeal is dismissed as regards the other properties. There will be no order as to costs in the circumstances.

Fazl Ali, J.—I agree.

W.D./R.K. *Appeal partly allowed.*

* A. I. R. 1932 Patna 150

JWALA PRASAD, J.

Sudhansu Bhattacharyya—Petitioner.

v.

Chairman, Patna City Municipality—
Opposite Party.

Civil Revn. No. 451 of 1930, Decided on 3rd February 1931, against order of Sub-Judge, Third Court, Patna, D/- 5th May 1930.

* **Civil P. C. (1908), O. 9, R. 13 — Defendant's knowledge of institution of suit does not dispense with proper service of summons.**

The mere fact that the defendant knew that a suit had been instituted would not dispense with the necessity of proper service of summons.

[P 151 C 1]

The defendant refused to receive summons on behalf of his minor brothers stating that he was not their guardian. The summons issued in his own name was returned by him unacknowledged and was not affixed to his house as required by O. 5, R. 17 and the process server returned the summons to the office stating that he could not deliver them as the defendant refused to accept them on the ground that he was not the guardian of his minor brothers. The Judge, holding service as sufficient in law, disposed of the case ex parte passing a decree in plaintiff's favour. The defendant applied under O. 9, R. 13, for setting aside the ex parte decree on the ground that the summons was not duly served upon him and therefore he could not attend and defend the case. The application was rejected.

Held: that the service was not sufficient and it was immaterial that the defendant knew of the suit. He had a right to receive notice of suit and date fixed for hearing and his application should have been granted: 43 Cal. 447; 21 Bom. 223 and 35 All. 163, Ref.; A.I.R. 1924 Pat. 446, Dist. [P 151 C 1]

M.K. Mukherjee—for Petitioner.

Jugal Kishore Prasad and Raja Ram Chunder Prasad—for Opposite Party.

Judgment.—This is an application against an order of the Subordinate Judge of Patna, dated 5th May 1930, dismissing

an application made by the petitioner under O. 9, R. 13, Civil P. C.

The opposite party instituted a suit for realization of taxes against Mr. A. K. Bhattacharyya and Mr. Lal Mohan Ganguly. Mr. A. K. Bhattacharyya is the owner of the house and Mr. Lal Mohan Ganguly was the tenant thereof. The suit was instituted on 12th October 1928. The defendant Mr. A. K. Bhattacharyya died during the pendency of the suit, and after his death his three sons Sudhansu Bhattacharyya, Salin Chandra Bhattacharyya and Salindra Nath Bhattacharyya were substituted as defendants on 1st June 1929. The latter two are minors and only Sudhansu Bhattacharyya is major; summonses were issued against the aforesaid three sons of Mr. A. K. Bhattacharyya, Sudhansu Bhattacharyya being described as the guardian of his minor brothers. The peon, who was entrusted with the service of summonses, took four copies of them with him: one being called the goshwara and the other three being in the respective names of the aforesaid three sons of Mr. A. K. Bhattacharyya. He tendered them to Sudhansu Bhattacharyya on 11th July 1929 but Sudhansu Bhattacharyya wrote on the back of the goshwara summons: "Received summons and a copy of the plaint" and signed it. He also endorsed:

"As I am not the guardian of the minors Sailendra Nath Bhattacharyya and Sailen Chandra Bhattacharyya I am not authorized to accept summonses on their behalf."

He then wanted the peon to give him the summons which was in his own name. The peon could not do so. He then penned through the aforesaid endorsement and wrote another which runs as follows:

"As there is no separate summons in my own name and as I am not the guardian of the minors Sailendra Nath Bhattacharyya and Sailen Chandra Bhattacharyya I am returning these"

The peon then returned all the four copies of the summonses including the goshwara referred to above to the office, endorsing on the back of the goshwara what had happened and stating that in the circumstances aforesaid he could not serve the summonses and therefore they were being returned unserved. The Court accepted the service as sufficient in law and disposed of the case ex parte on 13th September 1929, passing a decree in favour of the plaintiff.

On 5th November 1929, the defendant-petitioner filed an application under O. 9, R. 13, Civil P. C., for setting aside the ex parte decree on the ground that the summons was not duly served upon him therefore he could not attend and defend the case. This was refused by the Court below upon the ground that the defendant must have known of the institution of the suit against his father and latterly after his death when the peon went to him with the summonses. To my mind the Court below is wrong in this. In the case of *Kassim Ibrahim Saleji v. Johurmull Khemka* (1) it was pointed out by the Chief Justice (Woodroffe and Mookerjee, JJ., agreeing), that the mere fact that the defendant knew that a suit had been instituted would not dispense with the necessity of proper service of summons. His Lordship observed as follows:

"I may say at once that in one sense I regret that we have to allow this appeal because I have not much doubt in my mind speaking for myself that the institution of these proceedings did come to the knowledge of the defendant, and I do not think that the defendant has any merits in this application. But that is not the question. If we were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service it would not be right for us to say that it was sufficient service because we are strongly of opinion that the defendant knew of the issue of the writ."

That was a case of a substituted service, but the aforesaid observations apply with equal force to the case where the personal service is not effected in accordance with the mode prescribed by the Code of Civil Procedure. Similar was the view taken by the Chief Justice of the Bombay High Court in the case of *Bhomshetti Jinappasheti v. Uma Bai* (2). In that case his Lordship observed that in the matter of service of summons the Code of Civil Procedure does not take into account the fact that the members of the defendant's family would take steps to inform the defendant of what takes place in his absence. The Court below in this case has taken into consideration the fact that the petitioner in the lifetime of his father had signed the vakalatnamah on behalf of his father. With regard to this the observation of Tudball and Muhammad Rafiq, JJ., in the case of *Gulab*

Chand v. Shankar Lal (3) may with advantage be cited. They say:

"It was the duty of the Court to serve the summons after the suit had been registered. It is true that Gulab Chand knew that a suit had been instituted but he was entitled to receive a copy of the plaint and be informed of the date fixed in order that he might be able to protect his rights."

The Court below has referred to my decision in the case of *Nageshwar Bux Rai v. Bisseswar Dayal Singh* (4) where it was held that where service of summons has been effected by delivering it to the defendant personally the service is complete and no irregularity by the process-server or other ministerial officer of the Court such as the omission of the process-server to obtain the signature of the defendant or to affix a copy of the summons to the door of his house will invalidate it. In that case the summons was actually served upon the defendant and delivered to him and a copy was also tendered as required by R. 10, O. 5. The defendant refused to sign the acknowledgment and he also did not return the summons so that it might be affixed to the outer door or to some conspicuous part of the house of the defendant as required by R. 17 of the order. Therefore that case does not apply to the present case. In the present case, according to the report of the peon itself and now established by the only sworn testimony of the defendant-petitioner the summons in his name and the copy of the plaint were not tendered to him at all and were not delivered. R. 10, O. 5 says:

"Service of the summonses shall be made by delivering or tendering a copy thereof signed by the Judge, etc."

and under R. 2 the summons:

"shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement."

Accepting the case of the plaintiff opposite party that the peon delivered to the defendant the summons, but it was returned unacknowledged, in order to effect service thereof upon such refusal the procedure laid down in R. 17 should have been followed by the peon: that is, it should have been affixed on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, etc. Admittedly the peon did not do this, and the Court overlooking the aforesaid provisions did not apply

(1) [1916] 43 Cal. 447=34 I. C. 799.

(2) [1897] 21 Bom. 223.

(3) [1913] 35 All. 163=18 I. C. 711.

(4) A. I. R. 1924 Pat. 446=78 I. C. 889=3 Pat. 236.

its mind to the determination as to whether the summons was duly served or not as is required by R. 19 of that order. That rule in circumstances aforesaid says that the Court after such enquiry as is there mentioned:

"shall either declare that the summons has been duly served or order such service as it thinks fit."

But to my mind, accepting the only evidence of the petitioner in this case, the summons was not served in accordance with R. 10, read with R. 2, O. 5. Under R. 6, O. 9 the Court is entitled to "proceed ex parte" only when it is proved "that the summons was duly served." In this case the Court did not at all try to find out whether the summons was "duly served." Irrespective of whether the defendant had knowledge of the suit or not in a proceeding under O. 9, R. 13, if the defendant

"satisfies the Court that the summons was not duly served the Court shall make an order setting aside the decree as against him upon such terms as to costs, etc."

Therefore the finding of the Court below in this case that the defendant-petitioner must have known of the suit is of no avail. The application was made within time and it was proved that the summons was not duly served. There was no option but to set aside the ex parte decree which the Court failed to do and in this the Court refused to exercise the jurisdiction vested in it by law. The order is therefore capable of revision and is accordingly set aside.

As the plaintiff in this case did not try to obtain surreptitiously service of summons and took all steps to have the summons served upon the defendant and the defendant probably according to the finding of the Court below knew of the institution of the suit against him the defendant must be put upon terms and I accordingly direct that the order that the ex parte decree be set aside will take effect upon his depositing in the Court below, within two weeks after the receipt of the record in that Court, Rs. 25 as the costs of the Municipality of these proceedings.

R.M./R.K.

Order accordingly.

A. I. R. 1932 Patna 152

MACPHERSON AND SCROOPE, JJ.

Subhag Ahir—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 132 of 1931, Decided on 22nd June 1931 against decision of Sess. Judge, Shahabad, D/- 25th April 1931.

(a) **Criminal P. C. (1898), S. 195 (1) (b)—Cognizance of offence under S. 211—Subsequent events cannot bring into operation S. 195 (1) (b).**

Where a Magistrate takes cognizance of an offence under S. 211 nothing that happens subsequently can bring into operation the provisions of S. 195 (1) (b) so as to deprive him of his jurisdiction to proceed with the complaint of that offence in accordance with law: *A. I. R. 1920 Pat. 30 and A. I. R. 1920 Pat. 505, Foll.*

[P 154 C 1]

(b) **Criminal P. C. (1898), S. 195 (1)—Complaint of offence mentioned in S. 195 (1)—Accused is not entitled to show cause why complaint should not be made.**

A person against whom a complaint of an offence mentioned in S. 195 (1) is made is no more entitled to an opportunity to show cause why the complaint should not be made than a person against whom a complaint of any other offence is made: *A. I. R. 1920 Pat. 30, Foll.*

[P 154 C 1]

(c) **Criminal P. C. (1898), S. 195 (1) (b)—Offence under Penal Code, S. 211—Petition of informant traversing or repeating charge or claiming judicial investigation if made subsequent to taking cognizance does not bring into operation S. 195 (1) (b).**

If cognizance has been taken of the offence under S. 211, Penal Code, on the complaint of the police officer, before the informant, by an application to the Magistrate, has traversed the police report, repeated his charge and asked for judicial investigation, S. 195 (1) (b) does not become applicable; but where no cognizance has been taken by the Magistrate of the offence under S. 211, then the application of the informant if within definition of complaint does bring S. 195 (1) (b) into operation: *A. I. R. 1925 Pat. 717 and A. I. R. 1925 Pat. 483, Foll.* [P 154 C 1, 2]

(d) **Criminal P. C. (1898), S. 195 (1) (b)—Complaint by police officer under Penal Code, Ss. 182 and 211—Cognizance by Magistrate of case under S. 182—Informant repeating charge and claiming judicial investigation—Commitment to Sessions under S. 211 and consequent conviction—S. 195 (1) (b) held to bar commitment and conviction and sentence were set aside.**

A police officer preferred a complaint against an informant under Ss. 211 and 182, Penal Code. The Magistrate took cognizance under S. 182 and the informant by petition before the Magistrate asserted that the charge which was made was true, offered to prove it and asked for summons on the accused and direction to the police to forward the charge sheet against the accused. The case under S. 182 was transferred to another Magistrate who committed the case under S. 211 for trial at Sessions as the informant's complaint

was regarding offence under S. 377, Penal Code. The Sessions Judge convicted and sentenced the informant.

Held: that since the complaint of the offence in respect of the falseness of which the informant was prosecuted under S. 211 was pending disposal in the First Magistrate's Court the offence punishable under S. 211 must be deemed to be in relation to the informant's petition before the Magistrate, and the Magistrate was incompetent to take cognizance of it and to commit him to Sessions and the conviction and sentence by the Sessions Judge were without jurisdiction and must be set aside: *A. I. R. 1925 Pat. 717 and 483, Foll.* [P 154 C 2; P 155 C 2]

G. P. Cammiade—for Appellant.

Gopal Prasad—for the Crown.

Macpherson, J.—Subhag Ahir, who has been convicted by the Sessions Judge of Shahabad, disagreeing with the assessors, under S. 211, I. P. C., and sentenced to rigorous imprisonment for three years and a fine of Rs. 100, has appealed to this Court against the conviction and sentence.

On 11th July last at 11 a. m. Ghurbari Ahir of Gobinddih went to Piro Police Station with his son Chandradip Ahir, aged twenty-eight, and lodged information charging the present appellant with theft that morning at 8 a. m. of a hand-note and a stamp paper tied in a gamcha while the informant Subhag and another were going to the Lala to get a mortgage written. Chandradip Ahir is chaukidar of Gobinddih which itself is two miles from the police station.

At 11-30 a. m. the present appellant arrived at the thana accompanied by his son Nandkishore aged six and lodged information that about 6 a. m. that morning in the informant's baharghara Chandradip, chaukidar, had committed on Nandkishore the offence punishable under S. 377, I. P. C.

The police officer who recorded the information investigated both charges, sent up the present appellant on the charge of theft, pronounced the charge under S. 377 to be false and preferred a complaint to the Magistrate against the appellant of offences under Ss. 211 and 182, I. P. C. On the police report the appellant was placed on his trial on the charge of theft. On the complaint of the Sub-Inspector, the Subdivisional Magistrate on 31st July also summoned him under S. 182, I. P. C., for 14th August. On 14th August, Subhag Ahir applied that the case against him under S. 182 be postponed until the charge of theft should be disposed of, which prayer

the Subdivisional Magistrate granted. The appellant was convicted of the charge of theft; but in appeal the Sessions Judge while incidentally pronouncing the charge under S. 377 to be false acquitted the appellant because he was not satisfied that the case of theft was true.

The charge of theft having been disposed of, the case under S. 182 was taken up by the Subdivisional Magistrate. Thereupon the appellant filed on 23rd December a petition before the Subdivisional Magistrate in which he asserted that the charge which he had made, was true, offered to prove it and asked for summons on the accused, or that the police be directed to forward a charge sheet against Chandradip, chaukidar. The case was not fixed for that date and the Magistrate directed the application to be put up with the record. After being tossed about with reprehensible delay, the application was eventually on or after 11th January without further order of the Subdivisional Magistrate placed before Babu Akhileshwar Prasad to whom the case under S. 182 had been transferred on 5th January and who appears to have ignored its existence, if he ever knew of it. Babu Akhileshwar Prasad committed the case to the Sessions on a charge under S. 211 and the Sessions Judge convicted and sentenced the appellant as already stated.

Mr. Cammiade for the appellant submits, first, that the conviction is wrong on the merits, and secondly and more confidently, that the trial at the Sessions on a charge under S. 211 was without jurisdiction.

On the first point we did not consider it necessary to call upon the Assistant Government Advocate; but the matter is not of serious importance in view of the decision on the second submission.

On the question of jurisdiction Mr. Cammiade urges that in the circumstances of the case S. 195 (1) (b), Criminal P. C., prohibits a Court from taking cognizance of the offence under S. 211 except on the complaint in writing of the Court of the Subdivisional Magistrate or some Court to which his Court is subordinate inasmuch as the alleged offence under S. 211 was, on the decisions, committed in relation to the petition of complaint filed by the appellant on 23rd December in the Court of the Subdivisional Magistrate.

Now if the complaint of the Sub-Inspector of Police be considered, it is manifest that it removed the bar under S. 195 (1) (a) so far as the offence under S. 182 was concerned, and also that inasmuch as there is nothing in law to prevent the Sub-Inspector from making a complaint of an offence under S. 211, I. P. C. and to prevent the Court from taking cognizance of that offence on such a complaint, the Subdivisional Magistrate had jurisdiction to take cognizance both under S. 182 and under S. 211; but actually whether by reason of an apprehension that the case fell only under S. 182 between which and S. 211 there is, as was pointed out in *Daroga Gope v. Emperor* (1), a distinction in law, he expressly took cognizance under S. 182 only. If he had also taken cognizance of the offence under S. 211, nothing that could happen subsequently could bring into operation the provisions of S. 195 (1) (b) so as to deprive him of his jurisdiction to proceed with the complaint of that offence in accordance with law: *Parmanand v. Emperor* (2) and *Gonour Singh v. Emperor* (3) and numerous other decisions.

A person against whom a complaint of an offence mentioned in S. 195 (1) is made, is no more entitled to an opportunity to show cause why the complaint should not be made than a person against whom a complaint of any other offence is made: *Parmanand v. Emperor* (2). But in point of fact when the petitioner filed his petition of 23rd December there was no case under S. 211 pending against him.

Accordingly even if this petition was, as was pointed out in similar circumstances in *Gonour Singh v. Emperor* (3), merely one showing cause against his conviction so far as concerns the offence under S. 182 of which cognizance has already been taken, yet it was, upon the decisions of this Court, so far as S. 211 is concerned, a complaint of an offence, that is to say, the allegation made in writing to a Magistrate with a view to his taking action under the Code of Criminal Procedure, that Chandradip Ahir had committed an offence, and therefore a proceeding in a Court which

brought into operation the provisions of S. 195 (1) (b) where the wide expression used is "committed. . . . in relation to any proceeding in any Court." In cases of this class the question of the date when cognizance is taken of the police complaint is always important. If cognizance has been taken of the offence under S. 211 on the complaint of the police officer, before the informant, by an application to the Magistrate has traversed the police report, repeated his charge and asked for a judicial investigation, S. 195 (1) (b) does not become applicable; but where no cognizance has been taken by the Magistrate of the offence under S. 211, the application of the informant, if within the definition of a complaint, does bring S. 195 (1) (b) into operation. This is the view accepted by this Court in *Muhammad Yassin v. Emperor* (4) and *Daroga Gope v. Emperor* (1) and other cases which follow them. In both the cases cited the protest complaint of the informant preceded the taking of cognizance of the offence under S. 211 upon the formal complaint of the police officer. It was the same in the present instance. In none of the instances was a case under S. 211 against the informant pending when the protest complaint was filed by him.

It makes no difference that in the present instance complaint of an offence under S. 211 had been filed the Magistrate had failed to take cognizance unless indeed such failure can be said to imply a dismissal of the complaint under S. 211 in which case the difference, if any, would favour the appellant. Thus as a complaint of the offence in respect of the falseness of which the informant has been prosecuted under S. 211 was pending disposal in the Subdivisional Magistrate's Court the offence punishable under S. 211 though not alleged to have been committed in a proceeding in a Court must on the ruling cited be held to be in relation to such a proceeding that is, to the appellant's complaint of 23rd December 1930. Accordingly under S. 195 (1) (b) the Court of Babu Akhileshwar Prasad (even if that Magistrate had been, as is not alleged, empowered to take cognizance upon the complaint) was incompetent to take cognizance of the offence under S. 211 alleged to have been

(1) A. I. R. 1925 Pat. 717=88 I. C. 1045=26 Cr. L. J. 1269=5 Pat. 33.

(2) A. I. R. 1930 Pat. 30=116 I. C. 46=1930 Cr. C. 6=30 Cr. L. J. 554.

(3) A. I. R. 1930 Pat. 505=1930 Cr. C. 933=127 I. C. 287=31 Cr. L. J. 1200.

(4) A. I. R. 1925 Pat. 483=86 I. C. 825=26 Cr. L. J. 889=4 Pat. 323.

committed by the appellant or to commit him to the Sessions on a charge of that offence and the Sessions trial also was without jurisdiction. It follows that the conviction and sentence of the appellant must be set aside and he is directed to be released from bail.

The complaint under S. 182 still remains for decision by the competent Court which is that of the successor of Babu Akhileshwar Prasad. Should there be a conviction, the punishment, which has already been undergone by the appellant, may well be taken into consideration.

Scroope, J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1932 Patna 155

SCROOPE, J.

Bideshi Mian and others—Petitioners.
v.

Emperor—Opposite Party.

Criminal Revn. No. 558 of 1931, Decided on 6th January 1932, against decision of Addl. Deputy Commissioner, Dhanbad, D/- 8th September 1931.

(a) Criminal Tribes Act (6 of 1924), Ss. 3, 4 and 8—District Magistrate refusing to remove names of certain persons from register maintained under Act does not perform judicial function and High Court cannot interfere.

A District Magistrate refusing to direct the removal of the names of certain persons from a register maintained under the Criminal Tribes Act, acts as an executive officer and does not perform a judicial function and the High Court has no authority to interfere: 47 Cal. 843, Foll.; 15 Mad. 138, Dist. [P 155 C 2]

(b) Criminal Tribes Act (6 of 1924), Ss. 3 and 29—No Court can enter into question as to whether application of S. 3 is justifiable or not.

Under S. 29 no Court can enter into the question in any form whatsoever as to whether in fact the application of S. 3 was justifiable. The matter is one entirely within the discretion of the Local Government. [P 156 C 1]

B. B. Mukerji—for Petitioners.

C. M. Agarwala—for the Crown.

Judgment.—The facts of the case out of which this application arises are these: By Notification 1014, dated 12th June 1931, issued under S. 3, Criminal Tribes Act (6 of 1924), the Governor-in-Council declared that a gang of forty persons, whose names were given in the notification, were a criminal tribe for the purposes of the said Act. The notification runs as follows:

“Whereas the Governor-in-Council has reason to believe that the persons named in the list

hereto appended are members of a gang commonly known as Hari Singh's gang, and that the said gang is addicted to the systematic commission of non-bailable offences therefore the Governor-in-Council, in exercise of the powers conferred on him by S. 3, Criminal Tribes Act (6 of 1924), hereby declares the said gang to be a criminal tribe for the purposes of the said Act.”

Then follows a list of forty persons and the names of these five petitioners appear in the list. On 17th July last they were called on by the Superintendent of Police at Dhanbad to present themselves at Gobindpur thana to have their thumb-impressions taken. This was done, and their names were entered in the register which is maintained under S. 4 of the Act. They then applied to the Deputy Commissioner of Dhanbad under S. 8 of the Act, asking to have their names removed from the register, on the ground that they have been registered without any justification; but the Deputy Commissioner, after calling for a police report, declined to accede to their prayer. They have now come to this Court in its revisional jurisdiction, and it is contended for them that their names were wrongly entered as members of a criminal tribe, that they have never committed any non-bailable offence and that they are all men with cultivation and other honest means of subsistence and in fact not the kind of persons to whom the Criminal Tribes Act applies at all.

It is contended on the other hand by the learned Government Advocate that this Court has no jurisdiction to investigate whether the order directing their registration under this Act was justifiable, and in my opinion Sir Sultan Ahmad's contention is well-founded. The question is concluded by a decision of the Calcutta High Court in *Hasan Ali Bepari v. Emperor* (1). There it was held that a District Magistrate in refusing to direct removal of the names of certain persons from a register maintained under the Criminal Tribes Act was acting as an executive officer, and did not perform a judicial function and that the High Court had no authority to interfere. With the view expressed there, I entirely agree and the case relied on by the learned advocate for the petitioners, viz.: *Atchayya v. Gangayya* (2), relates to an entirely different matter, namely the question whether a Registrar acting under the Regis-

(1) [1920] 47 Cal. 843=57 I. C. 101=21 Cr. L. J. 581.

(2) [1892] 15 Mad. 138=2 M. L. J. 64 (F.B.).

tration Act is a Court for the purposes of Criminal Procedure Code. Assuming for the sake of argument that we set aside the order of the District Magistrate and direct the removal of the persons from the register, then it will follow that the gazette notifications which contain these persons' name will have to be modified and we shall be in effect holding that they were wrongly included in the Government orders; but that is to call into question the validity of the notification and that is what S. 29 in effect says:

"No Court shall question the validity of any notification issued under S. 3, S. 11, or S. 12, on the ground that the provisions hereinbefore contained or any of them have not been complied with, or shall entertain in any form whatever the question whether they have been complied with; but every such notification shall be conclusive proof that it has been issued in accordance with law."

It might conceivably be argued that S. 29 only refers to cases where it is sought to challenge the notification on the ground that there has been no previous publication, or no previous notice to the persons affected thereby; but all that is necessary for the application of S. 30 is that the Local Government should have reason to believe that the tribe, gang or class is addicted to the systematic commission of non-bailable offences; so S. 29 can only mean that no Court can enter into the question in any form whatsoever as to whether in fact the application of S. 3 was justifiable. The matter is one entirely within the discretion of the Local Government. In any view of the case therefore the application must fail and is accordingly dismissed.

R.M./R.K. *Application dismissed.*

A. I. R. 1932 Patna 156

COURTNEY-TERRELL, C. J. AND
SCROOPE, J.

Emperor

v.

Hazari Lal—Accused.

Jury Ref. No. 8 of 1931, Decided on 2nd November 1931, by Sess. Judge, Patna, D/- 26th September 1931.

Criminal P. C. (1898), S. 307—Judge must refer whole case to High Court and not individual charge as to which there is disagreement.

A Judge who disagrees with the verdict of a jury has a choice of alternatives. He may refrain from expressing his disagreement and if the verdict is one of acquittal record that acquittal and if of conviction record the conviction and pass sentence or he may refer the case together with his

opinion to the High Court. But he cannot exercise both the alternatives. [P 157 C 1]

Where therefore an accused is tried under several charges it is not open to the Judge who disagrees with the verdict of the jury on a particular charge to refer the case under that charge to the High Court under S. 307 and also record conviction and pass sentence in respect of other charges. He must submit the case and not only the matter of individual charge as to which there is disagreement between him and the jury: 39 I. C. 695, Ref. [P 157 C 1]

A. Aziz - for the Crown.

M. Yunus and Baldeva Sahai — for Accused.

Courtney-Terrell, C. J. — The facts relevant to our decision may be stated shortly. Hazari Lal was tried before the Sessions Judge of Patna upon the following charges (1) under S. 302, I. P. C. for the murder of Sub-Inspector Ram Narain Singh, (2) under S. 326, I. P. C. for grievous hurt to Head-Constable Birendra Nath Sen, (3) under S. 3, Explosives Act, 6 of 1908, for causing an explosion endangering life, (4) under S. 19 (e), Arms Act 11 of 1878, for carrying a revolver and cartridges in contravention of that Act, and (5) under S. 19 (f), Arms Act, for being in possession of a loaded revolver and cartridges in contravention of S. 14 of that Act.

Charges (1) and (2) were tried with the aid of a jury. The other charges were tried by the Judge and the members of the jury officiated as assessors.

The jury acquitted the accused of charge (1) and found him guilty under charge (2). The verdict of the jury is recorded by the Sessions Judge in the following terms:

"The accused Hazari Lal is found not guilty under S. 302. This is the unanimous verdict of the jury. The jury find Hazari Lal unanimously guilty under S. 326, I. P. C."

There is no doubt that the real meaning of the jury was that they found him not guilty on the charge of murdering Sub-Inspector Ram Narain Singh and guilty on the charge of causing grievous hurt to Head Constable Birendra Nath Sen, although on a merely strict construction of the words recording the verdict it is doubtful whether the verdict of guilty under S. 326, I. P. C. applied to the injury to Head Constable Birendra Nath Sen only or is a finding of guilty of a minor offence under the first charge relating to the murder of Sub-Inspector Ram Narain Singh, or whether it relates to both charges. To avoid confusion specific questions should have been put to the jury. This is a matter however of minor im-

portance in the circumstances of the case and needs no further reference.

The learned Judge agreed with the unanimous view of the assessors and convicted the accused of the charges under the Arms Act and Explosives Act and sentenced him under the third charge to transportation for life and under each of the fourth and fifth charges to two years' rigorous imprisonment under each section, the sentences to run concurrently and to be concurrent with the sentence of transportation for life.

In dealing with the verdict of the jury upon the first and second charges the learned Judge took a curious and most unfortunate course. He disagreed with the verdict on the first charge, characterising it as perverse, but accepted the verdict on the second charge, recorded a conviction and sentenced the accused to transportation for life. He now refers the case under the first charge to this Court under S. 307, Criminal P. C.

It is clear that a Judge who disagrees with the verdict of a jury has a choice of alternatives. He may refrain from expressing his disagreement and if the verdict is one of acquittal record that acquittal and if of conviction record the conviction and pass sentence or he may refer the case together with his opinion to the High Court. But he cannot exercise both alternatives. S. 307 (1), Criminal P. C. states that if the

"Judge disagrees with the verdict of the jurors on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly."

That is to say, he must submit the case, not only the matter of the individual charge as to which there is disagreement between him and the jury. This interpretation is made clear when the words of sub-S. (2) are considered:

"Where the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail."

A prisoner can only be tried simultaneously on several charges when they arise out of the same transaction and if the High Court is properly to exercise its functions in a reference it cannot approach the transaction as a whole with its hands tied as to one or more aspects.

This is the basis of the section and of the decision of the Calcutta High Court in the somewhat similar case of *Emperor v. Ananda Charan Roy* (1). It is clear that if we took up this case we should be constrained by the verdict on one part of the transaction which has been accepted by the Judge.

The reference is accordingly rejected.

Scroope, J. — I agree. The learned Sessions Judge having accepted the jury's verdict on the charge under S. 326, I.P.C. and having convicted and sentenced the accused under that section has taken it out of her hands to deal with the case on a reference under S. 307, Criminal P. C.

R.M./R.K.

Reference rejected.

(1) [1916] 18 Cr. L. J. 551=39 I. C. 695.

A. I. R. 1932 Patna 157

MACPHERSON AND DHAVLE, JJ.

Rajendra Narayana Singh Deo and others—Appellants.

v.

Bihari Lal Chakravarty and others—Plaintiffs—Respondents.

Appeal No. 544 of 1929, Decided on 16th February 1932, from appellate decree of Addl. Dist. Judge, Manbhum. D/- 1st December 1928.

(a) **Evidence Act (1872), S. 65 — Purulia record room burnt in Mutiny—Register of Sarsikan papers in Manbhum Collectorate should be treated as original document and entries in it can be proved by certified copies thereof.**

A copy transcribed from a copy of an original document but not compared with the original is not secondary evidence of the original.

The Purulia record room was burnt during the Mutiny of 1857 and the plaintiff in a suit for declaration of his talabi brahmatter rights to a certain mauza had produced in evidence certain certified copies prepared from a register of Sarsikan papers in the Manbhum Collectorate.

Held: that in the above circumstances the register now available in the Manbhum Collectorate was to be treated as the original document and the entries therein could be proved by certified copies thereof which the plaintiff had produced.

[P 158 C 2]

(b) **Record of Rights — Interpretation — Sarsikan papers, in each district not standardized—Interpretation of term "Sarsikan jama" has to be made on facts of each case.**

The contents of the Sarsikan papers in each district are not standardised. Hence the interpretation of the term "Sarsikan jama" in such papers depends on the facts and the circumstances of a particular case. [P 159 C 2 P 160 C 1]

(c) **Land Tenures—Chota Nagpur—Manbhum—Talabibrahmatter is hereditary tenure at fixed rent not liable to enhancement.**

In Chota Nagpur Province especially in the Manbhum District the tenures known as talabi brahmatters among others take rank among the

hereditary tenures at a fixed rent not liable to enhancement. These tenures escheat to the Crown and not to the zamindars. [P 160 C 1,2]

(d) Land Tenure—Chota Nagpur—Manbhum District—Talabi brahmatter—Rent receipts showing particular sum as rent for over hundred years—Record of Rights after those hundred years showing slight variation e. g., rent enhanced by only one pie—Tenants right of fixed jama held not lost—Record of Rights—Manbhum District.

Where the rent receipts relating to a certain talabi brahmatter land in a certain mauza in the Birbhum District in Chota Nagpur, successively for over a hundred years show that a particular fixed sum has been the rent charged for the tenure a mere change of one pie in the Record of Rights prepared after those hundred years will not effect the tenant's rights to a fixed jama. Such a mere unexplained variation is insufficient to destroy the tenant's right to a fixed jama. The presumption in the above circumstances is that the rent is a fixed one: 1 W. R. 230 and 4 W. R. (Act 10 Rulings) 23, Ref. [P 161 C 1]

(e) Land Tenure—Chota Nagpur—Birbhum District—Talabi bramatter—Rent for whole holding proved to be certain sum—Plaintiff's share of rent one-fourth of that amount—Presumption is that plaintiff owns four annas share of holding.

Where it has been shown that the total rent for a certain bramatter land in a certain mauza in the Birbhum District is a certain amount and the plaintiff's share of rent for a part of the holding is one-fourth of the total rent the presumption is that the plaintiff is the owner of the four annas share of that holding: A. I. R. 1923 Cal. 66. [P 161 C 2]

P. R. Das and R. S. Chatterjee—for Appellants.

Sultan Ahmad and S. C. Mazumdar—for Respondents.

Dhavlé, J.—This appeal relates to Balipur a mauza in the Panchet Estate in the district of Manbhum. According to the plaint the plaintiff and their co-sharers like their predecessors-in-title had been in possession of a part of the mauza in talabi or kheraji brahmatter right on a uniform rate of rent from long before the Decennial Settlement, the kheraji or talabi rental for the mauza being shown as Rs. 6.12.0 in the Sarsikan paper of 1197 (Bengali Era) and the plaintiffs enjoying a demarcated 4 anna share of the mauza on a proportionate rent. In the proceeding leading to the Record of Rights which was finally published in November 1923 the plaintiffs were at first recorded as holders of a four anna share in the kheraji brahmatter but on an objection under S. 83, Chota Nagpur Tenancy Act, by the principal defendants 1 to 4 the immediate landlords of the plaintiff the status was altered from

kheraji brahmatter to jamai satwa and the rent which the plaintiffs had been uniformly paying for a long time was shown as liable to enhancement. The plaint therefore prays for declaration that a four anna share of the mauza belongs to the plaintiffs in kheraji brahmatter right that the rent payable by them is fixed at Re. 1-12-13-3(couries) and is not liable to enhancement and that the entries to the contrary in the Record of Rights are erroneous. The suit was contested by the defendants 1 to 4 who claimed that the mauza was in their khas possession as patnidars and that the plaintiffs and others held merely as ordinary raiyats. The learned Subordinate Judge who tried the suit came to the conclusion that the plaintiffs had a kheraji brahmatter right in the mauza that the rent paid by them for this right is fixed and not liable to alteration and the Record of Rights to the contrary is incorrect but he was not satisfied that it was four anna share in the mauza that was held by the plaintiffs. He accordingly decreed the suit in part. Defendants 1 to 4 appealed to the District Judge and there was a cross-appeal by the plaintiffs in so far as their claim to a declaration that they held a four anna share in the mauza had been dismissed by the trial Court. The learned District Judge dismissed the appeal and allowed the cross-appeal. Hence this second appeal by defendants 1 to 4.

Before dealing with the points really pressed in the appeal it is desirable to notice a contention that was raised somewhat half-heartedly by the learned counsel for the appellant. Among the papers relied on by the lower Courts is Ex. 5 a certified copy (extract) prepared from a register of Sarsikan papers in the Manbhum Collectorate. Learned counsel referred to the facts that the register is itself a copy of a copy the suggestion being that Ex. 5 is therefore inadmissible in evidence. Now it is undeniable that a copy transcribed from a copy of an original document but not compared with the original is not even secondary evidence of the original: see Illus. (c), S. 63, Evidence Act. But it has been found that the Purulia record room was burnt during the Mutiny of 1857 and it seems to me that the document which is to be treated as the original in these circumstances is the register now available in the Manbhum

Collectorate. Under S. 35, Evidence Act relevant entries in such registers are evidence and S. 65 of the Act shows that they can be proved by certified copies such as we have in Ex. 5. The document was therefore rightly admitted in evidence, notwithstanding the objection made by the defence. I observe further that the allegation found in para. 2 of the plaint that the Sarsikan paper of 1197 showed Baliapur as a mauza held in brahmatter right on the annual kheraji or talabi rental of Rs. 6-12-0 was not specifically controverted in the appellant's written statement and that there was apparently no dispute about the contents of the paper before the assistant settlement officer who disposed of the objection under S. 83, Chota Nagpur Tenancy Act, in appellants' favour.

Learned counsel for the appellants has urged that the lower Courts were in error in treating the Sarsikan paper Ex. 5 as if it gave the rents payable by the tenure-holders of the mauza named in it to the zamindars. He contends that the paper instead gives the figures of revenue as distributed by the zamindar over the various mauzas. He has suggested that the papers must have been submitted by the zamindar under the

"Amended Code of Regulation relative to the Decennial Settlement of Bengal, Behar and Orissa approved by the Governor-General in Council on 23rd November 1791: see pp. 308 et seqq of Colebrooke's Supplement to the Digest of the Regulations from 1793 to 1806."

According to para. 43 of this Code :

"all zamindars assisted by the Government in the course of the first year are to distribute the total assessment of their zamindaris on the several villages contained therein equally and impartially according to the rent derived therefrom respectively and to deliver a record of such distribution in the course of the three first months of the ensuing year and successively for each year, specifying the name of each village, the estimated quantity of land in each together with an extract thereof containing the distribution of the sudder jumma upon each pargana.

Now Ex. 5 does not purport to refer to the law under which the Sarsikan paper was submitted by the landlord or recorded in the Collectorate nor does it give possibly because it is an extract only of all the details required under para. 43 of the Code. What it does purport to do is to give the "Sasikan jumma" of Chakla Panchkote (now Panchet) in respect of Pargana Chourassi Baliapur (the present Behapur) is mentioned in it under the

heading "name of village" a heading which is followed by the subheading "talabi brahmattar," and Rs. 6-12-0 is shown against the mauza as the "sikka jama." Learned counsel has referred to the statement on p. 193 of Mr. Coupland's Gazetteer of the District of Manbhum 1911, that the so called quinquennial papers of 1197 (1790) which were furnished by the zamindar in this (Seil. the Barabhum) as in other estate regularly settled in order that in the event of default and a portion of an estate having to be sold, material for allocation of the revenue might be available, contains nothing but a list of 149 villages without any distribution of the revenue. He has also drawn attention to another statement at p. 196 of the same well-known book of reference that at the Decennial settlement the revenue of the Panchet estate was fixed at a certain amount which was "arrived at by a detailed assessment of every village within the zamindari with the exception of the numerous rent-free grants."

The former of these references suggests not only that the "quinquennial paper of 1197" was expected to give the distribution of the revenue upon of the villages but also that in estates other than Bharabhum, the zamindars failed in spite of regular settlement to give such distribution. The second reference is far from clear: if the "detailed assessment" of every village is taken to mean the revenue by the zamindar, and if on the other hand, the expression means the ascertainment of the zamindar's income from each village, it is not impossible that Ex. 5 merely repeats that figure. Sarsikan papers so called giving not the distribution of the revenue but only the zamindars' income from the mauzas are also not unknown in the Courts. The Sarsikan papers in First Appeal No. 156 of 1929 which was recently heard in this Court for example show the "total rent which the zamindars get from the ilaqadars" of the particular mauzas mentioned in them, and leave the column for "total revenue payable to Government" blank. It is true that these papers came not from Manbhum but from the neighbouring district of Hazaribagh, and that they were submitted by the zamindar long after the permanent settlement. I have only referred to them to show that the contents of Sarsikan papers are by no means effectively standardized. And that the

interpretation of the expression "Sarsikan-jama," in Ex. 5 must depend on the particular facts and circumstances of the present case. The contention that Ex. 5 gives the revenue and not the rent was not raised in the lower Courts and this is significant since the Assistant Settlement Officer also had treated the jama in Ex. 5 as the rent. No reference has been made to any evidence adduced on the point nor has any other amount of rent been suggested for the mauza such as would make a revenue of Rs. 6-12-0 at all probable having regard to the nature of the tenure. According to the Sarsikan paper itself the mauza was talabi brahmatter and it appears from Mr. Coupland's Gazetteer (p. 205) that the tenures known as talabi brahmatters among others take rank among the hereditary tenures at a fixed rent not liable to enhancement. For further information regarding the nature of these tenures one may perhaps refer to para. 97 of the final report of the survey and settlement operations in the district of Manbhum 1918-25. After dealing with lakheraj betalabi or niskar brahmatters which are all rent free and panchaki or mogli brahmatters which bear a very small quit rent fixed in perpetuity, Mr. Gokhale the Settlement Officer comes to kheraji or talabi brahmatters and says that:

"In course of their fair rent settlement it occasionally argued that the rent of kheraji brahmatter tenure is not necessarily fixed in perpetuity. In no single instance however was the rent of such a tenure found to have altered except as a result of fraud or collusion. It is perhaps not unlikely that kheraj brahmatter tenure were originally ordinary intermediate tenures on enhanceable rent which were called brahmatter merely because they were held by Brahmi. It has been in the past difficult enough for landlords in Manbhum to enhance the rent even of ordinary tenure-holders or raiyats under them. These difficulties must have been more formidable when the tenure-holders happen to be Brahmins and the superior landlords occupied a somewhat ambiguous position on account of their elevation from the rank of aborigines to the dignity of Chhatri Rajputs. No wonder therefore that in practice the rents of kheraji brahmatter tenures were never touched. In course of time hardly any difference came to be recognized between kheraji and mygli brahmatters. In the course of the settlement it was found that the rent of all brahmatter tenures whether kheraji or mogli, was fixed for ever and was not liable to alteration."

These tenures escheat to the Crown and not to the zamindars and the question of mineral rights between zamindar and tenure-holder had not arisen in those

days. The zamindar had therefore little interest in the mauza beyond the fixed talabi rent and if he even complied with para. 43 "of the Amended Code of 1791" would naturally in his tenures throw as much revenue upon such mauzas as possible. There is thus little definite reason in the present case for assuming that the rent of this talabi brahmatter mouza in 1790 must have been in excess of the revenue distributed by the zamindar on it even if it be the latter that was really shown in Ex. 5.

The considerations already set out regarding the nature of brahmatter tenures in the district incidentally go far to show that tent was not liable to enhancement even apart from such special statutory provisions as are contained in Ss. 9 and 51-A (1), Chota Nagpur Tenancy Act, or the similar provisions of the Bengal Rent Act (Act 10 of 1859), which was in force in this district down to December 1909. Has the rent changed in fact? Learned counsel lays stress on the circumstance that the Assistant Settlement Officer recorded an aggregate rent of Rs. 15-7-6 instead of the Rs. 6-12-0 of 1790, for the entire brahmatter tenure. But the order of the Assistant Settlement Officer, Ex. A, makes it clear that this includes rents paid by several tenants whose old receipts do not show them to be holders of any portion of the kheraj brahmatter. Plaintiff's own rate has only varied from Rs. 1-11-0 which is directly evidenced by two receipts of 1831 and 1833, Exs. 1 and 1 (1), to Re. 1-12-13-3 karas which is found in a number of receipts ranging from 1848 [Ex. 1 (k)] down to 1880 [Exs. 1 (a) and 1 (b).] In the Record of Rights it stands at Re. 1-12-9.

The calculation made by the Assistant Settlement Officer shows that the change merely responds to the substitution of the company's rupees for sikka rupees in the latter thirties of the last century. He apparently took the batta at one-sixteenth and found Rs. 6-12-0 plus the batta equivalent to Rs. 7-2-9 an amount which is exactly four times as large as Re. 1-12-12-3 karas, as Rs. 6-12-9 was to Re. 1-11-0. The learned District Judge on the other hand seems to have proceeded on the footing that the batta was at the rate of 1/15th according to him and Rs. 6-12-0 sikka, converted into company's coin must have been Rs. 7-3-4

gandas of which 1/4th would be Re. 1-12-16 gandas. Assuming this to be right we have here but nominal change in plaintiffs' favour from not later than 1848 [the date of Ex. 1 (k)] for Re. 1-12-13-3 karas and Re. 1-12-16 karas both differ from Re. 1-12-9 in King's coin the rent recorded by the Settlement Officer by less than a pie. In a number of reported decisions under Bengal Act 10 of 1859 it was held that such a nominal unexplained variation was insufficient to destroy the tenant's right of a fixed jama: see for example *Babu Huro Nath Roy v. Ameer Biswas* (1) and *Anundlal Choudry v. James Hills* (2).

The lower Courts have concurrently believed the direct evidence regarding the uniformity of or practically uniform amount of plaintiffs' rent furnished by the receipts. In addition they have relied on the Sarsikan papers, a deposit chalan (Ex. 2) of 1890 and landlord's acceptance of the deposite (Ex. 6), and a judgment of 1893 Ex. 9 (which was upheld in appeal Ex. 10) in certain rent suits in which the predecessor-in-title of the present plaintiff was able to defeat a claim of his landlord for the rent of khuchran lands in the village by showing that he was really a cosharer of the mauza which with others she held in kheraji brahmatter right. The learned District Judge concluded that the entry in the Record of Rights, that plaintiffs' rent was liable to enhancement could not be correct regard being had to the fact that the rent of plaintiffs' share has been uniform for such a long series of years. The learned counsel has argued that the lower appellate Court must in this connexion have overlooked the fact that the presumption from holding at an unchanged rate for 20 years, which is provided by sub-S. (2), S. 51-A, Chota Nagpur Tenancy Act, does not arise in the present case as it was not a suit application or proceeding under the Act. It has however been repeatedly held that even in cases where the statutory presumption is not directly applicable the Court may act on a similar presumption if the facts justify the necessary inference; see *Buzlal Karim v. Satish Chandra Giri* (3) and *Prankrishna Shaha v. Mukta Sundari*

Dasya (4). It is true that to presume from the mere absence of any alteration in the rent during a number of years (apart from any statutory provision) that the rent is fixed would be to drive the landlord to enhance rents at certain intervals even though he might himself not desire to do so. But in the present case there is more than one circumstance even apart from Ex. 5 with its disputed admissibility and disputed interpretation which taken with the long continued tenant of the same rent leads to a fair inference that the rent of the plaintiffs' share was fixed. One such circumstance is the nature of the tenure as gathered from the Gazetteer and Mr. Gokhale's Settlement Report. Another circumstance is the fact that more than once in the nineties of the last century when the Bengal Rent Act, Act 10 of 1859 was in force in the district plaintiffs' predecessor-in-title affirmed that he held a four anna share in the lakheraj brahmatter of the mauza at a rent of Rupees 1-12-13-3 karas and that the landlord took no effective steps against it. The concurrent finding that the plaintiffs' rent is fixed and not liable to alteration must therefore stand.

It has also been contended on behalf of the appellant that even if plaintiffs' rent be fixed and not liable to enhancement the lower appellate Court was in error in deducing a four anna share for the plaintiffs from the facts that the total rent of the kheraj brahmatter was Rs. 6-12-0 in 1790 and that plaintiffs' share of the rent from 1831 onwards was one quarter of that amount. *Krishna Kamani Dasi v. Nil Madhav Shaha* (5) has been cited in support and it has been urged that in order to justify such an inference it must be shown that the total rent had not undergone any change between 1790 and 1831, and that each fragment of the tenure was held at a proportionate rent. The point however that was decided in the case referred to was merely whether the subdivision of a tenure does or does not operate as breach of the continuity of the tenure even if each fragment is held at a proportionate rent and the aggregate rent equals the original rent notwithstanding the fact that sub-S. (3), S. 50, Ben. Ten. Act the Act which applied to that case, provides not for

(1) [1864] 1 W. R. 230.

(2) [1865] 4 W. R. Act, 10 Rule 33.

(3) [1911] 10 I. C. 325.

(4) [1913] 21 I. C. 544.

(5) A. I. R. 1923 Cal. 66=75 I. C. 312.

tenures but for land held by a raiyat. There is a similar provision in sub-S. (3), S. 51-A, Chota Nagpur Tenancy Act, which like the rest of the section was added to the Chota Nagpur Tenancy Act in 1920; and as was shown in the case from 36 C. L. J. it was held in a series of rulings under Act 10 of 1859 that mere subdivision does not effect the continuity of a tenure nor is that position contested in the present case. What has been argued is that as the aggregate rent now is Rs. 15-7-6 it may well be that the rent of the plaintiff's share went up between 1790 and 1831. I am unable to accept this as a fair inference in the circumstances.

The aggregate rent may possibly have been increased in the interval in one of the ways indicated in para. 9 of the plaint though it seems more likely that the increase was brought about in more recent times since the older the increase the greater the difficulty of appreciating how the plffs' rent remained uniform as it has clearly done at the earliest from 1831 (to go no further than the earliest receipt). The receipts produced on behalf of the plaintiffs speak of their predecessors' kisma (share) in kheraj brahmatter or of their being kisma in the kheraj brahmatter; they do not specify the share but from 1890 onwards it has been openly claimed against the landlord that the share is one-fourth. The plaintiffs' claim to a four annas share in the kheraj brahmatter was negatived by the learned Subordinate Judge on two grounds: (1) that the present aggregate rent was Rs. 15-7-6 and (2) that the plaintiffs were not able to establish how they came by the share claimed. The aggregate rent arrived at by the Assistant Settlement Officer is no ground for negating the claim. If, as the learned Subordinate Judge himself observed, the payment of higher rent by the cosharer of the plaintiffs does not establish the liabilities of plaintiffs' rent to alteration the aggregate rent now payable cannot be any index of the plaintiffs' share in the mauza. The learned District Judge who is the final judge of facts has also accepted the evidence that Ram Chakravarty, uncle and adopted father of the plaintiffs' predecessor Ramsundar Chakravarty, was one of four brothers who held the tenure, and that Ram's four annas share has now come to the plaintiffs. He also took into account the claims

to a four annas share made by the plaintiffs' in the nineties of the last century with the landlord's acquiescence or failure to establish the contrary. The landlords do not appear at any time to have suggested what plaintiff's share was if it was not four annas nor have they suggested by what stages the aggregate rent came to be Rs. 15-7-6 against the Rs. 6-12-0 of Ex. 5. Plaintiffs' share was thus not deducted merely from the fact that the rent of 1831 is one quarter of the figure found in Ex. 5. It seems to me that in these circumstances the Court of appeal below was justified in proceeding on the implied footing that the total rent of the tenure had not varied between 1790 and 1831 (whenever it was that plaintiffs' share was separated) and that accordingly the plaintiffs' share in the kheraji brahmatter was four annas.

In my opinion the points urged on behalf of the appellant all fail. I would dismiss the appeal with costs.

Macpherson, J.—I agree.

B.V./R.K.

Appeal dismissed.

* A. I. R. 1932 Patna 162

FAZL ALI AND JAMES, JJ.

Gobind Chandra Das and others —
Defendants—Appellants.

v.

Hayagrifa Upadhaya and others —
Plaintiffs—Respondents.

Appeal No. 6 of 1928, Decided on 24th April 1930, against original decree of Sub-Judge, Cuttack, D/- 23rd April 1928.

(a) **Hindu Law—Debts—Suretyship—Son is not liable for debts of father for being surety for honesty or good behaviour of another — Plea can be taken even after sale in execution against father.**

A son will not be liable for a debt incurred by the father on account of his having stood surety for the honesty or good behaviour of another person and such a plea can be successfully taken by the son even after the property has been sold in execution of a decree against the father: 4 Pat. L. J. 309, *Foll.*; 23 Bom. 454; 26 All. 611 and A. I. R. 1925 Pat. 609, *Ref.*

[P 166 C 1]

(b) **Deed — Construction — Security bond whether for payment of debt or for honesty — Terms of bond and circumstances must be looked to.**

In deciding the question whether a security bond is a bond for the payment of a debt or for the honesty of a guardian a confusion may sometimes arise if instead of looking to the essence of the transaction or the principal terms of the bond one goes on to attach too much importance to small details or bare subtleties. There is however a broad and substantial distinction between the two classes of sureties, and in order

to find out whether a particular transaction belongs to the one class or the other, one will in each case have to refer to the terms of the bond itself and the circumstances of the case.

[P 164 C 2]

B. K. Ray—for Appellants.

D. Kar—for Respondents.

Fazl Ali, J.—This is an appeal by defendants 1, 3 and 4 in a suit which was instituted by the plaintiffs-respondents under the following circumstances:

On 22nd October 1914 one Malati Debya applied to the District Judge of Cuttack for being appointed guardian of one Lingaraj Das, her minor brother. On 23rd January 1915 the application of Malati Debya was granted and she was directed to furnish security for a sum of Rs. 10,000. Such security was ultimately furnished by defendant 10 who is the father of plaintiffs 1 and 2 and grandfather of plaintiff 3, and two other persons Narain and Purusottam on 13th September 1918. On that date these three persons, along with Malati Debya herself, executed a security bond for a sum of Rs. 10,000, and by means of the bond defendant 10 as well as the other sureties hypothecated some of their properties. On 2nd December 1918 the minor Lingaraj Das died and defendants 1 to 4 and the father of defendants 5 to 9 succeeded to his estate as reversioners.

On 31st May 1921, the District Judge assigned the security bond to the defendants who some time later brought two account suits against Malati Debya and the three sureties, including defendant 10, and ultimately a final decree was passed fixing the amount payable by Malati Debya at Rs. 19,116 odd and directing that the amount for which the bond had been executed be realized by the sale of the properties hypothecated under the security bond if the amount was not paid within a certain time. When the defendants proceeded to sell the properties, the plaintiffs brought the suit out of which this appeal arises and prayed for a perpetual injunction restraining the defendants from selling the properties mentioned in Schedules Ka and Kha attached to the plaint. The properties in Schedule Ka were said to be the ancestral properties of the plaintiffs, and those mentioned in schedule Kha were said to be the properties purchased out of the joint funds of the family and from the income of the ancestral properties. The main ground upon which the plain-

tiffs sought to avoid the sale of the properties was that the security debt contracted by defendant 10 was not binding upon them. As however the prayer of the plaintiffs to stay the sale was not granted and the properties were sold during the pendency of the suit, the plaintiffs amended their plaint and added a further prayer for recovery of possession.

The suit was resisted by defendants 1 to 9 on a number of grounds which have been fully set out in the judgment of the trial Court. The main pleas of the defendants however which alone need be referred to here, were these:

"(1) That the properties mentioned in both the schedules attached to the plaint were the self-acquired properties of defendant 10; (2) that the plaintiffs were under a pious obligation to discharge the liability of defendant 10; (3) that the security bond was for the benefit of the family and the plaintiffs were bound by it; and (4) that the disputed properties having already been sold in execution of the decree passed on the basis of the security bond, the plaintiffs could not impeach the sale except on proof that the debt by defendant 10 was illegal or immoral."

The learned Subordinate Judge held: (1) that the properties in Schedule Ka were the ancestral properties of the plaintiffs as alleged by them and those mentioned in Schedule Kha had been acquired from the joint family funds; and (2) that the plaintiffs were not bound to pay the surety debt as defendant 10 had stood surety for the honesty of the guardian and the bond dated 13th September 1918 was tainted with illegality. On these findings he decreed the suit and held that the plaintiffs were entitled to recover possession of their share of the properties.

Now the plea that the properties mentioned in the plaint were the self-acquired properties of defendant 10 has not been pressed before us and the finding of the learned Subordinate Judge, which is adverse to the defendants on this point, has not been questioned. The learned advocate for the appellant however has attempted to argue among other things that the security bond executed by defendant 10 was for the benefit of the entire family and was as such binding upon the plaintiffs. He has laid some stress in this connexion upon the fact that defendant 10 was admittedly an old servant of Lingaraj's family and it is pointed out by him that this defendant has admitted in his evidence that he would not

have continued to be in service if Malati Debya had not been appointed guardian. These facts however standing by themselves, are not sufficient in my opinion to justify a finding that the security bond was necessarily for the benefit of the family and I agree with the learned advocate for the respondent that it has not been conclusively established in this case that the bond was either for legal necessity or for the benefit of the family.

The crucial question in the case appears to me to be whether, having regard to the terms of the bond, it can be said that the debt contracted under it was of such a character that the plaintiffs could be made liable for it under the bond. This raises the general question as to how far ancestral or joint family properties in the hands of sons or grandsons are liable for a debt contracted by their father or grandfather as a surety. It appears that at one time the law on the point was not very clearly understood and there was some doubt as to whether sons were compellable to pay the debts incurred by their father as a surety. The question however was discussed somewhat elaborately by Ranade, J., with reference to the original texts in *Tukaram Bhat v. Gangaram Mulchand Gugar* (1) and has also been dealt with in several subsequent decisions. It appears now to be settled law that of the four classes of surety debts referred to by Vrihaspati, while a son is liable to pay debts contracted by a father on account of his standing surety for payment of money lent or for delivery of goods, he is not bound to pay debts incurred by the father by being surety for the appearance or for the honesty of another: see *Tukaram Bhat v. Gangaram Mulchand Gugar* (1), *Maharaja of Benares v. Ram Kumar Missir* (2) *Satya Charan Chand v. Satpir Mahanty* (3) and *Brijnath Prasad v. Bindeswari Prasad* (4).

The main question which is thus to be decided in this appeal is whether the security bond with which we are concerned in this case was a bond for the payment of a debt or for the honesty of the guardian Malati Debya. It might be noted here that a confusion may sometimes arise if instead of looking to the

essence of the transaction or the principal terms of the bond one goes on to attach undue importance to small details or bare subtleties. For example if a debtor does not deliberately repay the loan he has contracted, he may be said to be acting dishonestly and one who stands a surety for the repayment of the loan may be said to be in a sense surety for the honesty of the borrower. Similarly, if a person receives money as a trustee and commits breach of trust by refusing to pay it to the persons entitled to receive it, that amount may well be said to be due from the trustee and he who guarantees against the dishonesty of such a trustee may also be said in a sense to guarantee that the amount found due from him would be repaid by him. The fact however remains, that there is a broad and substantial distinction between the two classes of sureties and in order to find out whether a particular transaction belongs to the one class or the other one will in each case have to refer to the terms of the bond itself and the circumstances of the case. The bond Ex. 1 with which we are concerned in this appeal is not very artistically drafted and there was considerable discussion at the Bar as to whether it is to be regarded as a bond for honesty or for payment of such amount as might be found due from the guardian. On a careful reading of the document I find that it consists of two important clauses. By one of these clauses the three sureties as well as Malati Debya undertook to be personally liable for a sum of Rs. 10,000 and also made all their properties including those hypothecated by the three sureties liable for that sum. This clause, it may be stated, also governs two other minor clauses wherein the conditions under which the bond was not to be in force are set out. The second important clause concerned the three sureties only and stated the conditions under which the properties hypothecated by them were to be held liable for the loss if any sustained by the estate. It runs as follows:

"Further as stated above we Ganesh Upadhaya, Purusottam Upadhaya and Narain Upadhaya, the sureties for the appointment of Malati Debya as guardian, do hypothecate our properties noted below as security on this condition that if the said Malati Debya or any person acting on her behalf commits waste or damage or misappropriates, steals, squanders away, loses, improperly uses, or destroys, injures, or transfers on account of fraud or (illegible) or carelessness

(1) [1899] 23 Bom. 454.

(2) (1904] 26 All. 611=1 A.L.J. 330.

(3) [1918] 4 Pat. L.J. 309=51 I.C. 791.

(4) A.I.R. 1925 Pat. 609=86 I.C. 791.

or insolvency, the property of the said minor or any portion or portions thereof during the period of her guardianship, the loss that may be caused to the said property or any portion or portions thereof can be remedied and compensation can be recovered from our aforesaid properties."

Now I regard this latter clause as the most important clause because evidently the defendants sought to enforce that clause against the sureties by asking for a mortgage decree against them and the Court also granted them a mortgage decree apparently relying upon this clause. It also appears that in the course of the account suit Malati Debya set up several false pleas to avoid payment of the amounts which were said to have come into her hands but those pleas were negatived by the Court. Keeping these facts as well as the general tenor of the document in view I have no doubt in my mind that defendant 10 had been made liable because he had stood surety for the honesty of Malati Debya who was found to have dishonestly retained certain sums of money which she should have reimbursed to the estate of the minor and therefore in my opinion the Court below was correct in holding that the plaintiff's share in the property hypothecated was not liable for the surety debt incurred by defendant 10.

I have quoted the hypothecation clause in the bond in extenso because it at once distinguishes the present case from the case of *Brij Nath Prasad v. Bindheswari Prasad Singh* (4), which was much relied upon by the learned advocate for the appellant. It is true that the facts of that case appear at first sight to be very similar to the facts of the present case, because in that case also a guardian appointed under the Guardians and Wards Act being required to give security, had found a surety, and the question arose of whether the liability of the surety could under the Hindu law be enforced against the ancestral property in the hands of his heirs. It was decided in that case that the heirs were liable for the surety debt incurred by their grandfather. But Ross, J., who delivered the judgment in that case (in which Kulwant Sahay, J., concurred) clearly pointed out that

"there was no basis for the finding of the Munsif that the security bond recited that the grandfather stood surety against embezzlement or misappropriation on the part of defendant 1,"

and that

"it was not suggested that there was any

reference in the bond to embezzlement or misappropriation."

In this case, however in the clause which I have reproduced from the bond reference has been made to more than one of the possible acts of dishonesty of which the guardian might be guilty, and it was to insure against such acts of dishonesty that the properties had been hypothecated.

The learned advocate for the appellant next relied on the case of *Chhakauri Mahton v. Ganga Prasad* (5), but in my opinion that decision also does not help him much. The question that arose in that case was whether a decree obtained by a person against a Hindu father, for damages on account of injury done to his crops by the obstruction of a channel through which he was entitled to irrigate his lands, in such circumstances that it could not be paid that the act of the judgment-debtor was one of wanton interference with the rights of the decree-holder, could be enforced against his son and the question was answered by Mukherji and Carnduff, JJ., in the affirmative. Mukherji, J. in the course of a very elaborate judgment, referred to two classes of cases relating to the liability of a Hindu son to discharge the debt of his father, when such debt consisted of money misappropriated by the latter. After referring to several apparently conflicting decisions on the subject the learned Judge proceeded to reconcile them as follows :

"These cases however may possibly be reconciled if we recognise the distinction between a criminal offence and a breach of civil duty. In the first three cases, the father was guilty of criminal misappropriation as regards sums of money for which he was accountable, while in the second set of three cases, the father merely failed to account for the money received by him, and his failure to do so constituted nothing more than a breach of civil duty. The distinction is real though refined, and was recognized in *Medai Tirumalayappa Moodaliar v. Veerabudra* (6). The case last mentioned consequently supports the view that where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt, but the position is different if the money has been taken by the father and misappropriated under circumstances which render the taking itself a criminal offence."

The learned advocate for the appellant laid great stress upon this passage, but it must be pointed out that what Mukherji, J., was dealing with there was not

5) [1912] 39 Cal. 862=12 I.C. 609.

(6) [1909] 4 I. C. 1090.

a surety debt or a debt which was incurred by the father in the interest of a stranger, but he was dealing with a class of debts which accrued by reason of the father himself having misappropriated or failed to account for money belonging to others. A careful reading of the judgment in that case will show that Mukherji, J., was careful enough to regard surety debts as a distinct class of debts altogether. At p. 869, after referring to a number of original texts, the learned Judge says as follows :

"If the provisions of all these texts are summarized, the result appears to be that the debts which a son is not under any obligation to pay may be grouped as follows: (i) debts due for spirituous liquor, (ii) debts due for lust, (iii) debts due for gambling, (iv) unpaid fines, (v) unpaid tolls, (vi) useless gifts or promises without consideration or made under the influence of lust or wrath, (vii) suretyship debts, (viii) commercial debts and (ix) debts that are not vyavaharika."

Again at p. 875 he says as follows :

"Reference was made at the Bar to decisions upon the question of the liability of a son to satisfy a suretyship debt of his father, and mention was made particularly of the cases of It is not necessary however to discuss for our present purpose the question of the liability of a Mitakshara son for the suretyship debt of his father, because the determination of that question depends upon the interpretation of special texts, specially the text of Vishnu, which defines the different kinds of sureties, namely, for appearance, for honesty, for debt and for delivery of the debtor's effect."

It is sufficient to say that suretyship debts must be regarded as a class by themselves, and are not necessarily to be governed by any principles that may have been laid down in connexion with other classes of debts. In my opinion the learned Subordinate Judge was right in relying on the case of *Satya Charan Chanda v. Satpir Mahanty* (3). That decision is authority at least for two propositions; (1) that a son will not be liable for debt incurred by the father on account of his having stood a surety for the honesty or good behaviour of another person; (2) that such a plea can be successfully taken by the son even after the property has been sold in execution of a decree against the father.

I have dealt so far only with the legal aspect of the case which in fact is the only aspect with which we are concerned in this appeal, though I might mention that on facts also the decision of the learned Subordinate Judge does not appear to be either a hard or an

inequitable one. As will appear from my statement of the facts of this case, Lingaraj Das, the minor, died less than three months after the execution of the surety bond, and it appears that defendant 10 made an application to the Judge shortly after the death of the minor that he was no longer responsible for the acts of the guardian. I am also told that the defendants have successfully proceeded against the other two sureties and apparently most of the defendants or their guardians do not seem to be dissatisfied with the decision of the Subordinate Judge, considering that there is no appeal before us on behalf of defendants 2 and 5 to 9.

In my opinion the suit has been rightly decided by the learned Subordinate Judge and the appeal must be dismissed with costs.

James, J.—I agree.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Patna 166

JAMES AND CHATTERJI, JJ.

Lalit Kishore Mitra—Assessee.

v.

Commissioner of Income-tax, Bihar and Orissa.

Misc. Judicial Appln. No. 50 of 1930,
Decided on 16th May 1930.

(a) **Income-tax Act (1922), S. 27—Income-tax Officer is justified in thinking that reason given by assessee for not filing return in time is inadequate.**

It cannot be said, as a point of law, that the Income-tax Officer and the Assistant Commissioner of Income-tax were not justified in their view that the reason given by the assessee for failure to file the return that the petitioner's son, who was entrusted with the responsibility of preparing it, forgot the matter owing to the fact that his father had entrusted him with the arrangements for the marriage of the petitioner's grand-daughter was inadequate. [P 167 C 1]

(b) **Income-tax Act (1922), S. 23 (4)—Summary assessment higher than previous year which was based on return submitted—It is not without evidence and is not illegal.**

Although a summary assessment was higher than that of the previous year which was based on the returns submitted by the assessee, it cannot be said that the assessment is based on no evidence or that it is so arbitrary in its nature as to be illegal. [P 167 C 1]

Jayaswal, Subal Chandra Mazumdar and N. N. Roy—for Assessee.

C. M. Agarwala—for the Crown.

James, J.—The petitioner failed to submit a return in accordance with a notice issued under the provisions of S. 22 (2), Income-tax Act, and his assessment was made summarily under S. 23(4)

of the Act. He applied under S. 27 of the Act stating grounds for his failure to submit his return, but the reasons were not found to be sufficient by the Income-tax Officer and his petition was rejected. An appeal to the Assistant Commissioner was dismissed, whereupon the petitioner applied to the Commissioner to state a case under S. 66 (2), Income-tax Act. This application was also rejected.

Mr. Jayaswal on behalf of the petitioner argues in the first place that he has shown sufficient cause for his failure, to submit his return under S. 22 (2) of the Act, and in the second place that the summary assessment was arbitrary and therefore illegal. The reason given for the failure to file the return was that the petitioner's son, who was entrusted with the responsibility of preparing it, forgot the matter owing to the fact that his father had entrusted him with the arrangements for the marriage of the petitioner's grand-daughter. The Income-tax Officer and the Assistant Commissioner considered this reason to be inadequate, and it certainly cannot be said, as a point of law, that they were not justified in their view. The summary assessment was larger than the assessment of 1927-1928 which was made on the basis of the petitioner's returns; but it cannot be said that the assessment was based on no evidence, or that it was so arbitrary in its nature as to be illegal. The application must accordingly be rejected with costs. Hearing fee two gold mohurs.

Chatterji, J.—I agree.

K.N./R.K. *Application rejected.*

A. I. R. 1932 Patna 167 (1)

DAS AND ADAMI, JJ.

Panchu Gopal Banerji—Assessee.

v.

Commissioner of Income-tax, Bihar and Orissa.

Misc. Judicial Case No. 98 of 1929, Decided on 17th December 1929.

Income-tax Act (1922), S. 66 (2) and (3)—No application under S. 66 (2) made—Application under S. 66 (3) is not maintainable.

The essential condition for an application under S. 66 (3) is that an application under S. 66 (2) has been made to the Commissioner and refused by him. The fact that the assessee makes an application under S. 33 invoking the powers of review and the application states that if the Commissioner is unwilling to exercise his power under S. 33 he should draw a statement of the case and refer it under S. 66 (1) is not sufficient.

[P 167 C 2]

Judgment.—This is an application under S. 66, para. 3, requiring the Commissioner of Income-tax to state a case to this Court.

Mr. Agarwala on behalf of the Commissioner of Income-tax takes a preliminary objection and it is this. He contends that the Commissioner was not asked by the petitioner to state a case under S. 66 (2), Income-tax Act, and that in these circumstances the present application is not maintainable.

It appears that the petitioner applied to the Commissioner under S. 33, invoking his power of review under that section. In his application the petitioner stated that if the Commissioner was unwilling to exercise his power under S. 33 he might be pleased to draw a statement of the case and refer it with his own opinion thereon to the High Court under S. 66 (1), Income-tax Act. This being the position, it is obvious that the present application is not maintainable. The essential condition for such an application is that an application under S. 66, para. 2, has been made to the Commissioner and refused by him. We must therefore reject the application with costs. Hearing fee two gold mohurs.

P.N./R.K. *Application dismissed.*

A. I. R. 1932 Patna 167 (2)

ADAMI AND KULWANT SAHAY, JJ.

Ganesh Das Kalu Ram—Assessee.

v.

Commissioner of Income-tax, Bihar and Orissa.

Misc. Application, Decided on 10th February 1930.

Income-tax Act (1922), S. 66 (2) and (3)—Application for copy struck off for non-prosecution and assessee's application under S. 66 (2) rejected as time-barred—Further application under S. 66 (3) is not maintainable.

An application for copy of the order of the Assistant Commissioner was struck off the file for nonprosecution. The assessee applied under S. 66 (2) after 30 days of the passing of the order and the application was rejected as time barred. A further application was made under S. 66 (3) and the assessee contended that he ought to have been allowed time for obtaining copy.

Held: that the application was not maintainable. [P 168 C 1]

Judgment.—This application must be dismissed on the preliminary objection on behalf of the Crown. An application was dismissed by the Assistant Commissioner of Income-tax on 19th February 1929 at Cuttack, in the presence of the petitioner

or his pleader. On 18th March 1929 the petitioner applied for copy and received information what number of folios was necessary. No further steps were taken by the petitioner and so on 3rd April the application for copy was struck off the file. On 4th April the petitioner made an application under S. 66, sub-S. (2). The Commissioner on the facts refused to admit the application on the ground that it was barred since S. 66, sub-S. (2) allows of only one month from the date of the passing of an order under S. 31 or under S. 32. This being so, under sub-S. (3), S. 66 the petitioner could not come up to this Court for assistance.

It has been argued before us that time ought to have been allowed for obtaining a copy of the order of the Assistant Commissioner and it should have been excluded in reckoning limitation. But the learned advocate for the petitioner is unable to state before us how he got a copy of the order or what time it took to get it. The record shows that he took no steps to get the required copy.

The application must be dismissed with costs; hearing fee two gold mohurs.

P.N./R.K. *Application dismissed.*

A. I. R. 1932 Patna 168

JAMES AND DHAVLE, JJ.

Prithvi Chand—Appellant.

v.

Satya Kinkar Das—Respondent.

Appeal No. 76 of 1930, Decided on 22nd May 1931, against original order of Sub-Judge, Purnea, D/- 8th February 1930.

(a) **Civil P. C. (1908), O. 21, R. 16—Application under O. 21, R. 16 can be combined with application for transmission of decree for execution under R. 2, Ch. 17 of the Calcutta High Court Rules.**

Rule 2, Ch. 17 of the rules of the Calcutta High Court permits an application under O. 21, R. 16 to be combined with an application for transmission of a decree for execution.

[P 168 C 2 ; P 169 C 1]

(b) **Civil P. C. (1908), O. 21, R. 16—Application under.**

An application under O. 21, R. 16, can only be entertained by the Court which actually passed the decree : 27 *Cal.* 488, *Foll.* [P 169 C 1]

(c) **Civil P. C. (1908), O. 21, R. 16—Decree transferred and name of transferee put on record by Court passing decree—Transferee obtaining order for execution in Court of another district—Latter Court cannot question right of transferee to execution.**

Where a decree is transferred and the name of the transferee is put on the record by the Court which passed the decree and the transferee obtains an order for execution in the Court of another district, it is beyond the jurisdiction of

the latter Court to entertain any question as to the transferee's right to the execution sought. If an objection regarding the capacity of the transferor is to be made it should be made to the Court which has the power to entertain an application under O. 21, R. 16 : 21 *W. R.* 141 ; 9 *Bom. H. C. R.* 49 and *A. I. R.* 1925 *All.* 662, *Foll. A. I. R.* 1927 *Pat.* 170, *Dist.* [P 169 C 1]

S. M. Mullick and *A. H. Fakhruddin*—for Appellant.

C. C. Das and *M. K. Mukharji*—for Respondent.

James, J.—In 1919 Sarat Chandra Roy obtained a decree in the Calcutta High Court for the sum of Rs. 9,930. The firm of which Sarat Chandra Roy was a member subsequently became insolvent, so that this decree vested in the Official Assignee of Calcutta. The decree was assigned by the Official Assignee to Babu Satya Kinkar Das who applied under R. 2, Ch. 17 of the Rules of the Calcutta High Court for execution of the decree as a transferee and for the transfer of the decree for execution to the District Judge of Purnea. After service of notices under O. 21, R. 16, Satya Kinkar Das obtained permission from the Calcutta High Court to execute the decree which was transmitted in due course to the District Judge of Purnea. The District Judge transferred the decree for execution to the Subordinate Judge, before whom the judgment-debtor took the objection that the decree had not vested in the Official Assignee of Calcutta, so that his assignment of the decree to Satya Kinkar Das was invalid. The Subordinate Judge held that these were matters regarding which objection ought to have been taken when notice under O. 21, R. 16, was served by the Calcutta High Court, and that as objection was not then taken, it could not subsequently be taken in the Court to which the decree had been transferred for execution.

Mr. S. M. Mullick, on behalf of the judgment-debtor, argues in the first place that the Calcutta High Court had no power to make any order under O. 21, R. 16, because an order under that rule can only be made after the transferee has applied for execution of the decree, and in this case the transferee did not apply for execution of the decree in the Calcutta High Court before its transfer for the purpose of execution to the Court in Purnea. But R. 2, Ch. 17 of the Rules of the Calcutta High Court permits an application under O. 21, R. 16, to be

combined with an application for transmission of a decree for execution and it does not appear that there was anything irregular in this procedure.

Mr. S. M. Mullick argues in the second place that since the Court to which the decree is transferred has, under S. 42, Civil P. C., the same powers in executing such a decree as if it had been passed by itself, the Subordinate Judge in Purnea was entitled to entertain the question of whether the decree had been validly transferred. He suggests that no notices were actually served by the Calcutta High Court and that whether notices were served or not, that Court merely considered the validity of the assignment made by the Official Assignee and did not enter into the question of whether the decree had vested in the Official Assignee. On the question of whether notices were served, the learned Subordinate Judge has remarked that it was proved before the Calcutta High Court that notices had been served. A witness named Atul Chandra Majumdar gave evidence to the effect that no notice had been served by the Calcutta High Court; but this witness was not believed by the learned Subordinate Judge and his finding may be accepted that notices were duly served. But whether notices were duly served or not, it would appear that the order of the Calcutta High Court permitting Satya Kinker Das to execute this decree is binding on the judgment-debtor unless he can get it set aside in the Calcutta High Court. It is well settled that an application under O. 21, R. 16, can only be entertained by the Court which actually passed the decree *Amar Chandra v. Guru Prosunno* (1); and it is manifest that if an objection regarding the capacity of the transferor is to be made it should be made to the Court which has the power to entertain an application under O. 21, R. 16.

It has, moreover, been long settled law that where a decree is transferred and the name of the transferee put upon the record by the Court which passed the decree, and the transferee obtains an order for execution in the Court of another district, it is beyond the jurisdiction of the latter Court to entertain any question as to the transferee's right to the execution sought: *Ram Chunder v.*

(1) [1900] 27 Cal. 488.

Mohendro Nath (2); *Framji Rustamji v. Ratansha Pestanji* (3) and *Ram Charan v. Salik Ram* (4). Our attention has been drawn to the decision of a Division Bench of this Court in *Ram Sewak Lal v. Satruhan Deo Saha*, A. I. R. 1927 Pat. 170. In that case a Munsif had given effect to an assignment which was on the face of it invalid. The High Court on this fact being brought to its notice, declined to recognise the assignment and dismissed the transferee's application for execution. The learned Judges, while holding that when a decree is transferred and the transferee has been substituted for the decree-holder, it is not open to the Court to which the decree has been transferred for execution to entertain any question as to the transferee's right to execute the decree, yet held that the judgment-debtor was entitled to raise in the latter Court the question that the decree is not executable. In that case, as I have said, the assignment was on the face of it invalid and it was on that ground that the execution petition was dismissed.

In the present case it has not been suggested that the assignment by the Official Assignee was in any way invalid, and if the judgment-debtor desired to object that the decree-holder's interest had not vested in the Official Assignee, he should have taken that objection when notice was served by the Calcutta High Court in the proceeding under O. 21, R. 16. If in that case the judgment-debtor had taken this objection and it had been decided against him, he would have had a right of appeal; and if he omitted to take this objection and allowed the case to be decided ex parte, he is bound by the decision of the Calcutta High Court and he cannot take objection in the Court to which the decree is transferred for execution.

I would therefore dismiss this appeal with costs.

Dhavle, J.—I agree.

R.M./R.K.

Appeal dismissed.

(2) [1874] 21 W. R. 141.

(3) [1872] 9 Bom. H. C. R. 49.

(4) A. I. R. 1925 All. 662=87 I. C. 436.

A. I. R. 1932 Patna 170 (1)

WORT, J.

Mosafir Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 512 of 1931, Decided on 14th November 1931.

Penal Code (1860), S. 182—Giving false information to police about bullock being missing is no offence.

The report alleging the disappearance of a buffalo neither being the report of a cognizable offence nor of a noncognizable offence and not in itself calling for any action on the part of the police officer to whom it was made, falls short of fulfilling the conditions necessary to justify a conviction under S. 182 of the Code: 57 I. C. 96, *Foll.* [P 170 C 1]

Safdar Imam—for Petitioner.

Judgment.—This rule is directed against the conviction of the petitioner under S. 182, I. P. C. He appears to have gone to the thana and informed the police that a bull buffalo was missing. This was quite false because it was subsequently established that he had already sold the animal to one Dhiba Dusadh for a sum of Rs. 30. The police however suspecting that an offence had been committed proceeded to inquire into the matter, and the Inspector of Police directed a case under S. 379, I. P. C.

From the judgments of the Courts below it would appear that what was suspected in the case was that the petitioner had a mind to eventually get up a case against Shiba Dusadh for some reason or other and that his visit to the thana, stating the fact of the missing buffalo, was the first link in the chain of his scheme. However the facts which were stated to the police disclosed no offence either cognizable or noncognizable and therefore it did not come within the mischief of S. 182, I. P. C. Reliance is placed upon the case of *Algoo Lal v. Emperor* (1) decided by Piggott, J. There the learned Judge states:

"The report alleging the disappearance of a bullock not being the report of a cognizable offence and not in itself calling for any action on the part of the police officer to whom it was made, falls short of fulfilling the conditions necessary to justify a conviction under S. 182, I. P. C."

I feel constrained in the circumstances of this case to follow the decision given in the case just cited, and that being so, the conviction must be set aside and the Rule made absolute.

B.V./R.K. *Rule made absolute.*

(1) [1920] 57 I. C. 96.

A. I. R. 1932 Patna 170 (2)

COURTNEY-TERRELL, C. J. AND FAZL ALI, J.

Mahabir Tewary and another—Defendants—Appellants.

v.

Chhathu Tewary and another—Plaintiffs—Respondents.

Misc. Appeal No. 125 of 1931, Decided on 1st March 1932, against order of Sub. Judge, Ranchi, D/- 7th April 1931.

Compromise—Partition suit—To set aside decree in such cases plaintiff has to prove allegation of fraud and not that division under compromise was bad.

In a partition suit, a compromise decree was passed. The said compromise decree was subsequently challenged in another suit on ground that the compromise was induced by fraud.

Held: that in such cases the trial Courts should see that the plaintiff by evidence proves that the compromise was induced by fraud and should not dilate on the question whether the division effected by the compromise was a thoroughly bad bargain as against the plaintiff. The legal procedure for setting aside a compromise is not a procedure for setting aside a bad bargain. The plaintiff has to prove the allegation of fraud in spite of the alleged bad division under the compromise. [P 171 C 1,2]

B. C. De—for Appellants.*B. Sahay and P. P. Varma*—for Respondents.

Courtney-Terrell, C. J.—This is an appeal against a decision of the Subordinate Judge remanding the case to the Munsif for decision after appointing a commission to report on certain matters which are specified in the Subordinate Judge's order. The facts which are relevant to our decision are as follows: It appears that in 1925 there was a partition suit in which one Sahdeo Tewary was the plaintiff and his two nephews Chhathu Tewary and Jangi Tewary were the defendants. In that suit a compromise petition was filed and a decree was passed in accordance with the compromise. The present suit was brought by Chhathu and Jangi against Mahabir Tewary and Raghubir Tewari, sons of Sahdeo Tewary, who was the plaintiff in the suit of 1925 to set aside the compromise as having been induced by fraud.

Now the allegations of fraud are specifically set out, albeit with immense verbosity in the plaint, and the simple point for determination by the Munsif was whether the plaintiff had or had not established that the compromise had been effected by the alleged fraud. Each side called one witness and the Munsif held

that the plaintiffs had not made out their allegations of fraud and dismissed the suit. When the case came before the Sub-Judge he took a course which I have frequently seen taken and against which I feel it my duty to protest. He made a mistake which is extremely common and which is the fruitful cause of immense and protracted litigation between parties. He came to the conclusion that the case involved the following questions:

(1) Did the plaintiffs sign the petition of compromise without understanding the details of allotments? If so, was it due to any fraud on the part of Sahdeo Ram?

(2) Do the two takhtas represent grossly unfair division? If so, are the plaintiffs likely to suffer material injury?

(3) Was the partition decree given effect to? If so, did the defendants acting on the compromise decree make any improvement?

The learned Subordinate Judge then went on to use the following expression of opinion which is the subject of my comment. He says:

"As regards the first and second questions, the determination of the first question depended on the answer to the second question. One of the plaintiffs stated that the value of Sahdeo's takhta is three times the value of their takhta."

We are constantly seeing in these Courts cases in which a party seeks to set aside a compromise on the ground that it was induced by fraud and he proposes to show that it was induced by fraud by going into the subject-matter of the compromise and showing that the division effected was unfair to him and it is argued that this is quite a permissible way of attacking the compromise inasmuch as it tends to show whether it was probable that the plaintiff would have entered into the compromise unless by fraudulent inducement. That is an entirely illogical method of approaching the case. Sometimes also the Court proceeds to examine whether the plaintiff's claim was well founded in law—an equally irrelevant inquiry. The proper method for a Court in approaching a case of this kind is to say to the plaintiff in effect:

"I will assume for the purposes of this case that the division effected by the compromise constitutes from your point of view a thoroughly bad bargain otherwise you would not have attempted to get it set aside but you must proceed to establish notwithstanding that assumption in

your favour, that the compromise was induced by fraud."

The legal procedure for setting aside a compromise is not a procedure for setting aside a hard bargain and Subordinate Courts should remember this. The learned Subordinate Judge did not proceed to deal with the very simple issue upon the evidence which had been recorded and which was before him as to whether the plaintiffs had or had not established the allegation of fraud but he remanded the case first of all for the appointment of a competent commission to go to the spot and prepare a map relaying the batwara plots by actual measurement on the survey map and prepare a khasra and give the annual value of each and every plot without taking into consideration the improvement if any made since 1925 and after taking into consideration such report the lower Court was to decide the case "as indicated above" meaning that the conclusions arrived at by the commissioner were to guide the Court on the question of "probabilities."

Now this order was, in my opinion, entirely unnecessary and puts the parties to an immense amount of trouble and expense and not only that it offends against the fundamental principles upon which cases for the attack of compromises should be approached. The order therefore of the Subordinate Judge should in my opinion be set aside and the case should be remanded to the Subordinate Judge for a decision upon the simple issue of fraud as established by the evidence and he should approach the case subject to the guidance of these observations. I would therefore allow the appeal. It is unnecessary to deal with the preliminary objection which was raised as to whether an appeal lies against the order of the Subordinate Judge for in any event it is a proper matter for being dealt with by way of revision. The respondents should pay the costs of this appeal.

Fazl Ali, J.—I agree.

B.V /R.K. *Appeal allowed.*

*** A. I. R. 1932 Patna 171**

SCROOPE AND DHAVLE, JJ.

Kartik Chandra Maity—Petitioner.

v.

Emperor—Opposite Party.

Cr. Rev. No. 16 of 1930, D/-13-5-1930.

(a) Criminal P. C. (1898), S. 79 and Sch. 5, Form 2—Endorsement on warrant not giving designation of constable executing warrant—Arrest is not invalidated.

Form 2, Sch. 5, has no bearing on endorsements under S. 79 and does not have the effect of invalidating the arrest simply because the endorsement on the warrant gives only the name and not the designation of the constable executing the warrant: 3 *Pat. L.J.* 493, *Rel. on.* [P 172 C 2]

(b) Criminal P. C. (1898), S. 80—Mention of fact of notification of warrant by Police Officer in his report is not necessary.

It is not necessary under S. 80 that the Police Officer executing the warrant should mention the fact of notification of the warrant in his report. It is sufficient if the requirements of the section are substantially complied with: 3 *Pat. L.J.* 493, *Rel. on.* [P 173 C 1]

* (c) Criminal P. C. (1898), Ss. 75 and 204—Per *Scroope, J.*—Two Magistrates at subdivisional headquarters with residential powers in matter of taking cognizance of offences of complaints and of issue of warrants under S. 204—In absence of one, other s presiding officer for purpose of S. 75 and can sign for other warrants issued under latter's direction—(*Dhavle, J.*, contra.)

Per *Scroope, J.*—Where there are two Magistrates at the subdivisional headquarters with identical powers in the matter of taking cognizance of offences on complaints and in the matter of issue of warrants under S. 204 in the absence of either from the head-quarters the remaining one is a presiding officer for the purpose of S. 75 and can sign for the other warrants issued under the latter's direction: 2 *Pat. L.J.* 487, *Dist.* [P 175 C 1]

Per *Dhavle, J.*—The legislature does not intend to permit a delegation of the duty of signing warrants. Consequently the warrant signed not by the Magistrate taking cognizance of the case but by another Magistrate "for S. D. O." who is the presiding Magistrate, is invalid. The absence of the S. D. O. on tour does not confer on another Magistrate the authority that the S. D. O. had under S. 204 as the Magistrate taking cognizance of the offence to issue the warrant. [P 173 C 2]

(d) Penal Code (1860), Ss. 224, 225 and 353—Arrest or apprehension must be lawful in every way.

It is essential for convictions under Ss. 224, 225 and 353 that prosecution should show that the apprehension or arrest is lawful in every way: 18 *All.* 246; 41 *I. C.* 323; 27 *Cal.* 457 and 23 *Cal.* 411, *Rel. on.* [P 173 C 2]

(e) Penal Code (1860), Ss. 224 and 225—Constable acting under invalid warrant—Resistance to him is no offence—S. 54 (1), Criminal P. C. does not apply to such case.

If a constable in effecting an arrest specifies a certain power which proves to be wanting, resistance to him or escape from his custody constitutes no offences. Where the constable purports to act under a warrant which is found to be invalid, and where there is no allegation by the constable in his deposition that he proceeded under S. 54 (1), S. 54 (1) does not apply: 48 *I. C.* 340, *Foll.* [P 174 C 1]

(f) Penal Code (1860), Ss. 147 and 342—Five accused assaulting constable who was

acting under colour of office—Accused held rightly convicted of rioting and wrongful confinement.

Where the accused who were five in number while resisting an arrest under an invalid warrant caused hurt to and wrongfully confined a constable who was acting in good faith under colour of office.

Held: that the accused were rightly convicted under Ss. 147 and 342 for rioting which was indulged in with the common object of assaulting the constable and for his wrongful confinement. [P 174 C 2]

R. S. Chatterji—for Petitioner.

C. M. Agarwala—for the Crown.

Dhavle, J.—The petitioner Kartik Chandra Maity has been sentenced to nine months' rigorous imprisonment and a fine of Rs. 200 under S. 234, concurrently with rigorous imprisonment for six months under Ss. 342 and 147, I. P. C. each. The other four petitioners have been sentenced to concurrent terms of six months' rigorous imprisonment under Ss. 225, 342 and 147, I. P. C. All the five petitioners have also been convicted under S. 353, I. P. C., but on appeal the learned Sessions Judge, while affirming the conviction, did not consider it necessary to pass any separate sentence under this section.

It appears that Kaira Ho, a constable, was deputed from police station Baharagora in the Dhalbhum Subdivision of Singhbhum to execute a warrant of arrest against the petitioner Kartik Chandra Maity and his brother Nabo Kumar Maity, following a complaint under S. 379, I. P. C. which had been preferred before the Subdivisional Magistrate of Dhalbhum. Kartik was found outside the house, shown the warrant against him and formally arrested. He asked the constable to go with him to Nabo's house where, he said, both the brothers would furnish bail together. On approaching Nabo's house however the constable was assaulted by the five petitioners and tied with a rope to a post inside Nabo's house.

The learned advocate for the petitioners has assailed the conviction on the ground that the arrest of Kartik was not lawful. He has contended that the endorsement on the warrant against Kartik should have been given not the name only but the designation also of Kaira Ho. S. 79, Criminal P. C., however only requires the name to be endorsed, and Form 2, Sch. 5, Civil P. C., to which reference has been

made, has no bearing on endorsements under S. 79 and will further not have the effect of invalidating the arrest: vide *Bankey Behary Singh v. Emperor* (1). The learned advocate has also contended that the arrest was illegal because the constable does not in his report say that he had notified the substance of the warrant of Kartik. But S. 80, Criminal P. C. does not require the fact of the notification to be mentioned in the report; and on the fact found by the lower Courts it is quite clear that the requirements of the section were substantially complied with in the present case and that Kartik had "reasonable opportunity of knowing on what charge he was being arrested and before what Court he was to appear, so that he might take steps to arrange for his defence"

to quote from p. 498 of the report of *Bankey Behary Singh's* case (1) already cited. A more substantial objection on behalf of the petitioners is based on the fact that the warrant is signed not by the Subdivisional Magistrate who had taken cognizance of the case under S. 379, I.P.C., but by another Magistrate Babu K. C. Chatterji, "for S. D. O. Dhalbhum." S. 75, Criminal P. C. requires that the warrant shall be signed by the presiding officer; and the learned advocate has cited the case of *Jagpat Koeri v. Emperor* (2), in which a warrant of arrest signed not by the Magistrate who had taken cognizance of the case but by an Honorary Magistrate who lived in the same town was held invalid under the section. Prima facie the "presiding officer" of the Court of the Subdivisional Magistrate was the Subdivisional Officer himself. An inquiry has been made from the Deputy Commissioner of Singhbhum regarding Mr. Chatterji's powers under the Code of Criminal Procedure and his authority to sign the warrant for the Subdivisional Officer of Dhalbhum. The reply received does not refer to any provisions of the Code under which Mr. Chatterji could have signed the warrant, but says that he has been vested with powers under "Ss. 190 (a) and (b), 143, 144 and 192" of the Code and that he is almost invariably left in charge in the inevitable absence of the Subdivisional Officer on tour and signs "for Subdivisional Officer" if that officer has sanctioned the order previously and as Deputy Magistrate in charge if he

acts on his own initiative. Mr. Chatterji did not in the present case act "on his own initiative." I do not see how the absence of the Subdivisional Officer on tour could operate to enlarge Mr. Chatterji's powers under the Code or to confer on him the authority that the S. D. O. had under S. 204, as the Magistrate taking cognizance of the offence, to issue the warrant. It is true that the order for the issue of the warrants was passed by the S. D. O. himself, but we have not been referred to anything in the Code which will enable a Subdivisional Magistrate to get his warrants signed by a Subordinate Magistrate. The learned advocate for the petitioners has in this connexion drawn attention to the contrast between Ss. 68 and 75 of the Code: warrants issued under the latter section "shall be signed by the presiding officer," while summonses issued under S. 68 may be signed by the presiding Officer "or by such other officer as the High Court may, from time to time, by rule direct." The inference seems clear that the legislature did not intend to permit a delegation of the duty of signing warrants. I am not at all satisfied that the warrant signed as it was by Mr. Chatterji, was valid. Ss. 224 & 225, I.P.C., deal with resistance to or escape from "lawful apprehension," and S. 353 with "assault to deter a public servant from discharge of his duty." It thus becomes essential for the convictions under these sections that the prosecution should show that the apprehension or arrest made or attempted by Kaira Ho was lawful in every way—vide such cases as *Queen-Empress v. Dalip* (3), *Sampat v. Emperor* (4), *Durga Charan v. Queen-Empress* (5), and *Raman Singh v. Queen-Empress* (6). Mr. Agarwala for the Crown has not contested this but has endeavoured to meet it by referring to S. 54 (1), Criminal P. C., which authorizes any police officer, without an order from a Magistrate and without a warrant, to arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. He has cited *Kishun*

(1) [1918] 3 Pat. L. J. 493=46 I. C. 523.

(2) [1917] 2 Pat. L. J. 487=39 I. C. 494.

(3) [1896] 18 All. 246=(1896) A. W. N. 48.

(4) [1917] 18 Cr. L. J. 803=41 I. C. 323.

(5) [1900] 27 Cal. 457.

(6) [1901] 28 Cal. 411=5 C. W. N. 134.

Mandar v. Emperor (7) in support, but that was not a case of an invalid warrant and the person wanted in that case was found by their Lordships to come within the terms of S. 54. In the present case there was no reference to the section in the lower Courts, and the question of what the constable knew, believed or suspected against Kartik was not gone into. The constable did not purport to act without a warrant and the probability is that (apart from the invalid warrant) he had no knowledge or suspicion of his own at all that Kartik was concerned in any cognizable offence. What he actually did was to endeavour to execute the warrant. In *Appaswami Mudaly v. Emperor* (8), it was observed that if a constable in effecting an arrest specifies a certain power which proves to be wanting, resistance to him or escape from his custody constitutes no offence. To hold that S. 54 applies in such cases without any intimation to the accused, and without any allegation by the constable in his deposition that he proceeded under the section would be to nullify several salutary provisions contained in Part B Ch. 6, Criminal P. C., relating to the execution of warrants of arrest. In *Mousi Lal v. Emperor* (9), decided in this Court in 1918, Roe and Jwala Prasad, JJ, refused to accept a similar contention and observed:

"But nowhere in his evidence does he (the constable) suggest that he had reason for such belief. He purports to have acted under cover of the warrant and we must take the case as stated by the complainant in it."

The case of *Emperor v. Bhola Bhagat* (10), which has also been referred to by Mr. Agarwala, is easily distinguishable. Mr. Agarwala has also referred to S. 23, Police Act 1861, but this section does not cover the execution of invalid warrants, nor does it extend a constable's powers of arrest. In this view the convictions of the petitioners under Ss. 224, 225 and 353, I. P. C., cannot be upheld and I would set them aside.

The learned advocate has also contended that the document admitted as the First Information in the case, Ex. 3 is not in fact the first information and should have

been excluded. This contention is supported by the facts that four days before Ex. 3 was drawn up there were two informations given at the thana and recorded in the station diary, Exs. 5 and 6, of which the latter was given by the constable himself. It is however clear that the convictions of the petitioners do not materially rest on this inadmissible document, and cannot therefore be interfered with on this ground: see *Gansa Oraon v. Emperor* (11).

The offences under Ss. 342 and 147 stand on a different footing from those under Ss. 224, 225 and 353. As the warrant was invalid, Kartik and his friends were entitled to resist or escape from a custody which was not strictly lawful. But they went further and caused hurt to the constable and wrongfully confined him. The constable was plainly acting in good faith under colour of office, though like the petitioners themselves he was probably unaware that the warrant he had been deputed to execute had been signed by an unauthorized person. The petitioners are thus clearly punishable for the rioting which was indulged in with the common object of assaulting the constable, and for the wrongful confinement of the constable. I would therefore affirm the convictions and the sentences passed upon the five petitioners under S. 147 and 342, I. P. C.

Scroope, J.—I agree except as regards the third ground on which the warrant is urged to be invalid, namely, because it has not been signed by the Subdivisional Magistrate who directed the issue of the warrant, having taken cognizance of the case under S. 190 (1) (a), Criminal P. C., but by another Magistrate Babu K. C. Chatterji "for S. D. O., Dhalbhum." The report received from the Subdivisional Officer of Dhalbhum shows the circumstances in which Babu K. C. Chatterji came to sign the warrant; he was left in charge during the absence of the Subdivisional Officer on tour and accordingly he signed the warrant "for the Subdivisional Officer." He is a Deputy Magistrate with First Class powers and has powers also under Ss. 190 (1) (a) and 190 (1) (b) as well as under Ss. 143, 144 and 192, Criminal P. C.; so in respect of taking cognizance of offences

(7) A. I. R. 1926 Pat. 424=98 I. C. 254=27 Cr. L. J. 1310=5 Pat. 533.

(8) A. I. R. 1924 Mad. 555=81 I. C. 51=25 Cr. L. J. 563=47 Mad. 442.

(9) [1918] 19 Cr. L. J. 1000=48 I. C. 340.

(10) A. I. R. 1923 Pat. 547=72 I. C. 375=24 Cr. L. J. 375=2 Pat. 379.

(11) A. I. R. 1923 Pat. 550=73 I. C. 561=24 Cr. L. J. 641=2 Pat. 517.

on complaint his powers are identical with those of the Subdivisional Magistrate. He thus signed the warrant as Deputy Magistrate in charge during the absence of the Subdivisional Officer on tour and in my opinion he was "the presiding officer" for the purposes of S. 75. Owing to the exigencies of official business it is not by any means possible for the execution of an order to follow at once on the passing of the order and there may be cases where owing to his absence on tour in the interior of a subdivision or absence at the district headquarters or illness a considerable period might have to elapse before the Subdivisional Officer's signature can be obtained on a warrant in which he has directed to issue. The argument of the learned advocate for the petitioner requires one to hold that in such circumstances warrants must be held up until the Subdivisional Officer is himself able to sign them. Obviously the course of justice might very seriously be impeded if such were the law facilitating as it would the escape of offenders. In such a case I consider that a warrant expressed as here to issue from the Court of the Sub-divisional Magistrate and signed as here "for the Sub-divisional Magistrate" by a Magistrate who himself would have jurisdiction in the matter is a valid warrant and that such an officer is a "presiding officer" for the purposes of S. 75. This view does not amount to any enlargement of existing powers; it simply renders feasible the exercise of existing powers; in other words, where there are two Magistrates at the subdivisional headquarters with identical powers in the matter of taking cognizance of offences on complaints and in the matter of issue of warrants under S. 204 (under which section the warrant in the present case was issued) I would say that in the absence of either from the headquarters the remaining one can sign for the other warrants issued under the latter's direction. The case in *Jagpat Koeri v. Emperor* (2) is not on all fours with the present one. That was a case of an Honorary Magistrate who, as far as can be seen, had no powers under S. 190, Criminal P. C. and could not in any view of the matter be called the Magistrate in-charge or "the presiding officer."

I would therefore maintain the conviction under Ss. 224, 225 and 353, I. P. C. but pass no separate sentence thereunder

as the sentences passed under Ss. 147 and 342, I. P. C. are sufficient punishment for the petitioners.

P.N./R.K.

Order accordingly.

* A. I. R. 1932 Patna 175

COURTNEY-TERRELL, C. J.

Kartick Chandra Maity and others
Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 16 of 1930, Decided on 18th June 1930.

* Criminal P. C. (1898), Ss. 75 and 204—**Presiding officer is not necessarily one who took cognizance of offence, but one who presides in that Court at the time of signing warrant.**

The presiding officer who alone can sign the warrant is not necessarily the officer who has taken cognizance of the offence. He must be the officer who presides in the Court at the time when the warrant comes to be signed and not necessarily the Magistrate who has presided in the Court at the time when cognizance was taken of the offence.

Where therefore a Magistrate is appointed by Government with power to take cognizance of offences and indeed to perform the functions of the Subdivisional Officer while he is away from the station, such Magistrate is the presiding officer within the meaning of S. 75 and can properly sign the warrant the issue of which had been directed by the person whose place he is for the time being filling: 2 Pat. L. J. 487, Dist.

[P 176 C 1,2]

R. S. Chatterji—for Petitioners.

B. P. Jamuar—for the Crown.

Judgment. *—The facts material to the decision of the only point before me are very simple. The Subdivisional Officer of Jamshedpur received information of an alleged offence of theft and took cognizance of the offence and directed the issue of a warrant for the arrest of the two persons against whom the complaint was made. After directing the issue of the warrant the Subdivisional Officer went away from the station on duty and the warrant was ultimately signed during his absence by Mr. K. C. Chatterji, First Class Magistrate, who had been invested by the Government with powers under Ss. 190 (a) and (b), 143, 144 and 192, Criminal P. C. The constable who went to execute the warrant was resisted by the two persons with whose arrest he was charged and by other persons who

* The case was argued before the Chief Justice owing to a difference between the learned Judges who decided *A. I. R. 1932 Patna 171*—Ed.

together with those two are the applicants for revision, and he was assaulted. The applicants for revision have been convicted of assault and with respect to the conviction for assault no point arises.

The only point taken by the applicants in so far as the matter comes before me is their conviction for unlawful resistance to a police officer in the execution of his duty. The question raised on behalf of the applicants is as to the legality of the warrant which had been signed by Mr. Chatterji. My attention has been directed to S. 75, Criminal P. C., which provides that every warrant of arrest issued by a Court under the Code must be in writing and must be "signed by the presiding officer." Now S. 204, Criminal P. C., which provides for the issue of warrants makes it quite clear that only the Magistrate who takes cognizance of an offence may direct the issue of a warrant. Having directed the issue of a warrant before the warrant can be executed it must bear the seal of the Court and also it must be signed. It is conceded that although only the Magistrate who has taken cognizance of the offence may direct the issue of a warrant yet nevertheless the Magistrate who signs the warrant provided he comes within the term "presiding officer" may sign the warrant although he may not have been the particular individual who has taken cognizance of the offence, for example, if a Subdivisional Officer receives a complaint and directs the issue of a warrant, but is transferred to another district before he can sign the warrant, it is conceded that the warrant may be signed by his successor who it is said is in fact the presiding officer, and with this contention I agree. It follows therefore that the presiding officer who alone can sign the warrant is not necessarily the officer who has taken cognizance of the offence. He must therefore be the officer who presides in the Court at the time when the warrant comes to be signed and not necessarily the Magistrate who has presided in the Court at the time when cognizance was taken of the offence. In this particular case Mr. Chatterji was appointed by the Government with power to take cognizance of offences and indeed to perform the functions of the Subdivisional Officer while he was away from the station and in those circumstances it seems to me that

he is the presiding officer within S. 75 and could properly sign the warrant the issue of which had been directed by the person whose place he was for the time being filling.

My attention has been called to *Jagpat Koeri v. Emperor* (1) which was decided by Chamier, C. J. But the facts in that case differ materially from the facts in this. There the Subdivisional Officer took cognizance of the case and directed the issue of the warrant, but the Magistrate who actually signed the warrant was in no sense the presiding officer under S. 75. He was merely an Honorary Magistrate and he does not appear to have been vested with any powers either for taking cognizance of offences or indeed any other powers which would bring him within the meaning of the words "presiding officer." There is a passage in the report of Sir Edward Chamier's judgment which may have given rise to a little misunderstanding. In stating the facts the learned Chief Justice said:

"On the same day a warrant was issued for the arrest of Jagpat Koeri, but it was signed not by the Magistrate who had taken cognizance of the case (the "presiding officer" within the meaning of S. 75, Criminal P. C.), but by an Honorary Magistrate who lived in the same town."

It would seem, on reading these words, that it might be possible to construe the learned Chief Justice as implying that only one who has taken cognizance of the case can be termed a "presiding officer" within the meaning of the section; but it is clear that that cannot be the meaning of the Chief Justice because it is conceded that if a Subdivisional Officer has taken cognizance of a case and directed issue of a warrant the warrant may be signed by the successor of that Subdivisional Officer who ex hypothesi has not taken cognizance of the case.

In my opinion the warrant was legal and accordingly the resistance to the arrest was unlawful and the accused persons were properly convicted. The application is accordingly rejected.

K.N./R.K. *Application rejected.*

(1) [1917] 2 Pat. L. J. 487=18 Cr. L. J. 526=39 I. C. 494.

A. I. R. 1932 Patna 177

KULWANT SAHAY AND JAMES, JJ.

Ram Prasad Gupta and others — Petitioners.

v.

Ramkishun Prasad—Opposite Party.

Civil Revn. No. 294 of 1931, Decided on 1st March 1932, against order of Dist. Judge, Shahabad, D/- 9th February 1931.

(a) Religious Endowments Act (1863), S. 14—Mosques, temples or religious establishments mentioned in S. 14 are only those to which Regulation 19 of 1810 was applicable.

The mosque, temple, or religious establishment mentioned in S. 14 is not any mosque, temple or religious establishment whatever, but any mosque, temple or religious establishment for the support of which endowments in land have been made by the Government or private individuals, in other words, mosques, temples or religious establishments to which Regulation 19 of 1810 was applicable. [P 178 C 1]

(b) Religious Endowments Act (1863), Ss. 18 and 14—Ss. 14 and 18 apply to endowments, superintendence of which could vest in the Board of Revenue under Regulation 19 of 1810—Endowment of land by individual for support of Hindu temple comes within purview of Regulation 19 of 1810.

All that is necessary in order to attract the provisions of S. 14 and S. 18 is to show that the endowment is of a nature that the superintendence of it could vest in the Board of Revenue under Regulation 19 of 1810 if it were in force. It is clear from the preamble of the Regulation that an endowment of land by an individual for the support of a Hindu temple comes within the purview of that Regulation: 18 *All.* 227; 23 *W. R.* 453 (*P. C.*) and 19 *Cal.* 275, *Rel. on.*

[P 178 C 2, P 179 C 1]

(c) Hindu Law — Religious endowment — Endowment for maintaining services in temple—Founder completely divesting himself of interest in property—Endowment is of public nature—(Obiter).

(*Obiter*)—Where the purposes of an endowment is for maintaining the services in the temple in which the images of Sri Ramchandraji, Lachhmanji and Sri Janki Maharani had been installed and the founder had divested himself completely of his interest in the property, and had transferred it to the temple and the images therein, the protection of the endowment, according to Hindu law, ultimately vests in the Crown and as such it must be treated to be of a public nature.

[P 179 C 1]

(d) Hindu Law — Religious endowment—Public nature—Test of, laid down—(Obiter).

(*Obiter*)—One of the tests to determine whether an endowment is a private family endowment or a public endowment is to consider whether the founder or all the members of the family could divert the income of the endowed property to their own private use or to any purpose other than that expressed in the deed of endowment.

[P 179 C 1]

Anand Prasad—for Petitioners.*Shiveshwar Dayal and Kameshwar Dayal*—for Opposite Party.

1932 P/23 & 24

Kulwant Sahay, J.—This is an application in revision against an order of the District Judge of Shahabad dismissing the petitioners' application under S. 18, Religious Endowments Act (20 of 1863), for leave to institute a suit for the removal of the muttawali of a Hindu endowment in the town of Arrah. The learned District Judge has held that the petitioners are interested in the trust, that they were animated by bona fide motives and that there has been mismanagement and breach of the trust. He has however held that the petitioners have failed to show that the endowment was a public endowment and that in order to bring the case within the provisions of S. 18 of the Act it was necessary to show that the endowment was a public endowment. The application for leave to sue was therefore dismissed on the sole ground that the endowment in question was not of a public nature. The point for consideration therefore is whether it is necessary, to attract the provision of S. 18 of the Act, that the endowment must be of a public nature; and secondly, whether the endowment in the present case is a public endowment.

On behalf of the petitioners it is contended that it is not necessary to prove for the purposes of S. 18 of the Act that the endowment must be of a public nature. Act 20 of 1863 was primarily passed to relieve the Boards of Revenue and the local agents in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation 19 of 1810 of the Bengal Code and Regulation 7 of 1817 of the Madras Code, as is evident from the preamble of the Act. Ss. 3 to 13 of the Act provide the mode of transferring to the trustees etc., of the trust property which were then held in charge of the Boards of Revenue, for deciding disputes as to the right of succession to trusteeship, the rights of the trustees to whom the property was to be transferred, for appointment of committees for exercising the powers which were till then exercised by the Boards of Revenue or the Local Agents, for the constitution and duties of those committees and the qualifications of the members thereof, for their tenure of office, for the manner of filling up vacancies, and for duties of trustees and of the committees as to accounts, etc. S. 14 of

the Act then provides for suits by persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto, against the trustees, managers or superintendents of the mosques and religious establishments for any misfeasance, breach of trust or neglect of duty committed by them. S. 18 provides that no suit contemplated by S. 14 shall be entertained without the leave of the Court previously obtained, and "Court" has been defined in S. 2 as the principal Court of original civil jurisdiction in the district in which the mosque, temple or religious establishment is situate.

The question is whether the suit contemplated by S. 14 refers to suits in respect of mosques, temples or religious establishments in general, or only to such mosques, temples and religious establishments as are dealt with in Ss. 3 to 13 which evidently contemplate mosques, temples and religious establishments to which Regulation 19 of 1810 was applicable. It was held in *Jan Ali v. Ram Nath Mundul* (1) that the mosque, temple or religious establishment mentioned in S. 14 of the Act is not any mosque, temple or religious establishment whatever, but any mosque, temple or religious establishment for the support of which endowments in land have been made by the Government or private individuals, in other words, mosques; temples, or religious establishments to which Regulation 19 of 1810 was applicable. This appears to be the true interpretation to be placed upon S. 14 of the Act of 1863. What we have to consider is whether, if the Regulation of 1810 were still in force, the endowment in question in the present case could have been brought within the purview of that regulation or not. As appears from the preamble to the Regulation of 1810, all that was necessary to attract the provision of the Regulation was that the endowment granted in land should have been by the Government or by individuals for the support of mosques, Hindu temples, colleges, etc. In the present case the endowment expressly is by an individual for the support of a Hindu temple, and there is no reason to hold that, had the Regulation 19 of 1810 been in force the pre-

sent endowment could not have been brought within the purview of it. It is true that S. 16 of the Regulation states that the object of the Regulation was solely to provide for the due appropriation of lands granted for public purposes agreeably to the intent of the grantor; but the preamble to the Regulation shows that when endowments had been granted in land by an individual for the support of a Hindu temple such endowments were to be considered as for public purposes. S. 16 of the Regulation merely gave an assurance to the public of the object for which the Regulation was passed, viz., to provide for the due appropriation of the lands granted for public purposes agreeably to the intent of the grantor and not to resume any part of the produce of them for the benefit of the Government, so that no suspicion may arise as to the objects of the Government.

If therefore the endowment in question in the present case came within the purview of Regulation 19 of 1810, as it obviously did, being an endowment of land by an individual for the support of a Hindu temple, it is to be presumed that it was one for public purposes, and S. 14 of the Act of 1863 and consequently S. 18 thereof must be held to be applicable. In *Sheoratan Kunwari v. Ram Pargash* (2) what was contended for was that Act 20 of 1863 applied only to those endowments the nomination to which had been exercised by or had vested in the Board of Revenue under Regulation 19 of 1810, and it was held that this contention was not sound and that it was not necessary to show that the temple was one which was formerly under the control of the Board of Revenue. In *Delrus Banoo Begum v. Kazeer Abdoor Rahman* (3) it was held that in order to vest the superintendence of an endowment in the Board of Revenue under Regulation 19 of 1810 it was necessary that the endowment should be of a public nature. That case went up to the Privy Council, and although their Lordships disposed of the appeal on another point and held that it was not necessary for them to determine whether the endowment in question was of such a character as would sustain a suit under Act 20 of 1863, yet they ob-

(1) [1881] 8 Cal. 32=9 C. L. R. 433.

(2) [1896] 18 All. 227=(1896) A. W. N. 37.

(3) [1875] 23 W. R. 453=15 B. L. R. 167.

served that they saw no reason for disagreeing with that part of the judgment of the High Court where it had held that the endowment was not of such a public character as would sustain a suit under the Act of 1863: see *Asghar Ali v. Delroos Banoo Begam* (4). This view was followed by Tottenham and Banerjee, JJ., in *Protap Chandra Misser v. Brojo Nath Misser* (5). I am therefore of opinion that all that is necessary in order to attract the provisions of S. 14 and S. 18 of the Act of 1863 is to show that the endowment is of a nature that the superintendence of it could vest in the Board of Revenue under Regulation 19 of 1810 if it were in force; and as, in my opinion, the endowment in question in the present case is of such a character, the District Judge had jurisdiction to grant the leave under S. 18; and in refusing to do so he has failed to exercise his jurisdiction vested in him by law.

In this view of the case it is not necessary to consider the terms of the endowment in order to determine the purposes thereof. Had it been necessary to do so I would hold that the endowment is of a public character. The purpose of the endowment was for maintaining the services in the temple in which the images of Sri Ramchandraj, Lachhmanji and Sri Janki Maharani had been installed. The founder had divested himself completely of his interest in the property and had transferred it to the temple and the images therein. The protection of the endowment in such a case, according to Hindu law, ultimately vested in the Crown and as such it must be treated to be of a public nature.

One of the tests to determine whether an endowment is a private family endowment or a public endowment is to consider whether the founder or all the members of the family could divert the income of the endowed property to their own private use or to any purpose other than that expressed in the deed of endowment. Here under the express terms of the deed the income could not be so diverted in any event and at any time, but was to be used for all time to the purpose of maintaining the services in the temple. I would therefore set aside the order of the District Judge and grant the leave under S. 18 of the Act as

applied for. Having regard to the nature of the case, I am of opinion that there should be no order for costs.

James, J.—I agree.

S.N./R.K.

Order set aside.

A. I. R. 1932 Patna 179

MACPHERSON AND FAZL ALI, JJ.

Bindeshwari Prasad and others—Plaintiffs—Appellants.

v.

Nanhku Mahton and others—Defendants—Respondents.

Second Appeals Nos. 1648 of 1928 and 673 to 688 of 1929, Decided on 15th February 1932, against decision of Sub-Judge, Patna, D/- 8th October 1928.

(a) **Bengal Tenancy Act (1885), S. 30 (a)**—**Lump rental of holding is aggregate of rents of different plots computed in accordance with rate appropriate to class of each plot.**

The basis of S. 30 (a) is the division of the lands of a village into classes to each of which is attached a rate of rent; if a holding is held at a lump rental it must be the aggregate of the rents of the different plots computed in accordance with the rate appropriate to the class of each plot: *A. I. R. 1930 Pat. 332, Ref. [P 181 C 2]*

(b) **Bengal Tenancy Act (1885), S. 30 (a)**—**"Prevailing rate" explained.**

The expression "prevailing rate" of rent means a definite customary rate per bigha current in the village at which a particular class of land is held and does not mean an average rate per bigha for that class and still less for all lands: *A. I. R. 1930 Pat. 332, Foll.; A. I. R. 1929 Pat. 702, Cons. [P 182 C 1]*

(c) **Bengal Tenancy Act (1885), S. 31-A**—**Applicability.**

The principle of S. 31-A cannot be applied to an area in respect of which the provision has not been notified: *A. I. R. 1930 Pat. 332, Foll. [P 182 C 2]*

(d) **Bengal Tenancy Act (1885), S. 30 (a)**—**"Prevailing rate paid in neighbouring village" is that which prevails in neighbourhood generally and not merely in one village.**

The expression "the prevailing rate paid in neighbouring villages" contemplates a rate of rent (doubtless reminiscent of the pargana rate), which prevails in the neighbourhood generally and not merely in one neighbouring village or area of such village, least of all when in the latter case it is fortuitous: *2 Pat. L. J. 124, Dist. and not Appr.; A. I. R. 1930 Pat. 332, Rel. on. [P 182 C 2]*

(e) **Bengal Tenancy Act (1885), S. 30 (a)**—**Rate based upon commuted rents whether can be said to exist—(Quaere).**

(Quaere)—It is doubtful whether a rate of rent based upon commuted rents in another village can at all be said "to exist" within the meaning of S. 30 (a). *[P 183 C 1]*

(4) [1877] 3 Cal. 324 (P. C.).

(5) [1891] 19 Cal. 275.

(f) Bengal Tenancy Act (1885), S. 30 (b)—Holding consisting of both bhit and dhanhar lands—Enhancement exceeding lower of two rates is illegal unless landlord is able to distinguish in lump rental aggregate rent for bhit and aggregate rent for dhanhar.

Unless the landlord is able to distinguish in lump rental the aggregate rent for bhit and the aggregate rent for dhanhar, it is impossible to predicate that an enhancement exceeding the lower of the two rates is not beyond the admissible maximum and therefore illegal (unless conceivably where it is very slightly over the lesser maximum). [P 183 C 2]

K. Husnain, Shiveshwar Dayal, Baldeo Sahay and C. P. Sinha—for Appellants.

A. K. Roy and S. S. Prasad Singh—for Respondents.

Macpherson, J.—These seventeen second appeals arise out of as many suits under S. 30, Ben. Ten. Act. The landlord of village Onda claimed enhancement of rent on the grounds that the rate of rent was below the prevailing rate of rent and also that there had been a rise in the average local prices of staple food-crops during the currency of the existing rent. Acceding to these pleas the Munsif enhanced all the rents with effect from S. 1334-F on finding first under S. 30 (a) that there was in a neighbouring village a prevailing rate of rent of Rs. 8-2-0 per bigha which the defendants should be called upon to pay, and secondly under S. 30 (b) that the rise of the price of the two staple food-crops warranted an additional one anna per rupee on the rent of dhanhar lands and an additional one and a half annas per rupee on the rent of bhit lands included in the holdings. He did not specify how the enhancement was to be effected where a holding consisted partly of dhanhar and partly of bhit lands.

Defendants appealed and plaintiffs preferred cross-objections against the order under S. 30 (b). The appellate Court having found that if there was any prevailing rate it had not been correctly determined, disallowed the claim for enhancement under S. 30 (a) but increased the rate of enhancement under S. 30 (b) to the maximum of three annas one pie in the rupee in the three cases (corresponding to appeals Nos. 674, 676 and 683) which consist of dhanhar lands, to the maximum of four annas eight pies in the rupee in the two cases (corresponding to Appeals Nos. 678 and 680) which consist of bhit lands only and to four annas in the rupee in the 12 cases where the

holdings contain both dhanhar and bhit lands. The landlords have now appealed against the rejection of the claim under S. 30 (a) and there are cross-objections in the first seven appeals and in Appeals Nos. 682 and 683.

The cross-objections are preferred against the enhancement allowed and against an entry in the decree of liability to pay road cess which is not mentioned in the judgment. In respect of enhancement there arises in Appeals Nos. 1648, 673, 675, 676, 677 and 678 the special question whether where there are two staple food-crops, the lower of the two rates of enhancement is the maximum which can legally be allowed. The other four cross-objections are as already indicated preferred in cases where there is only one staple food-crop.

A Deputy Collector was appointed commissioner under S. 31 (b) to ascertain the prevailing rate. (It should be mentioned that S. 31-A has not been extended to the Patna District in which Onda is situated.) The commissioner reported that there was no prevailing rate of rent in respect of the lands. A Sub-Deputy Collector was then appointed commissioner, his attention being drawn to the decision of this Court in *Brij Behari Singh v. Sheo Shankar Jha* (1). He found that the lands of the village fell into three classes which differed in value but he made no attempt to ascertain into which class or classes the lands in each holding fell or what was the rate of rent, if any for each class. He found it impossible to ascertain the prevailing rate of rent, if any in Onda. He then considered a neighbouring village named Nerut with respect to which he remarked :

"I consider that the fields of Nerut compare favourably with those of Onda both as regards the capacity of their soil and fertility."

He found that there were differences in Nerut in quality of soil just as there were in Onda. As the commutation proceeding of 1910 showed that in two of the three patts there were 302 tenants whose produce rents were commuted at Rs. 13 per acre (or Rs. 8-2-0 per bigha) whereas in the third patti there were only 130 whose rate of commutation was Rs. 11, he came to the conclusion that Rs. 8-2-0 was the prevailing rate in Nerut adding however :

(1) [1916] 2 Pat. L. J. 124=39 I. C. 85.

"I must note however, that the rents referred to above are the results of commutation of produce rent and I am not sure whether such rents should be a proper standard in comparison with the rents of the cash rent-paying lands of village Onda."

The learned Munsif however had no qualms and lightly brushed aside all difficulties. He apparently accepted the view that the prevailing rate of rent was the rate paid by the majority of raiyats in the neighbourhood holding similar lands enjoying similar advantages, as suggested by one of the Judges in *Shadhoo Singh v. Ramnoograha Lall* (2) both without considering the cogent view that it is the rate paid for the majority of similar lands enjoying similar advantages and without the concurrence of his colleague. He apparently failed to attach any significance to the fact that in the patti in question the rent paying lands fell into three classes (1) the "old nakdi holdings;" (2) the holdings held at rents commuted under S. 40; and (3) the holdings whose bhaoli rent was subsequently commuted by private agreement, or to the superiority of quality of the lands of Nerut where the cash rent per bigha even for old nakdi holdings had always been nearly as high as the commuted rent of 1910. He strangely misread the report of the commissioner as setting out that Onda compares favourably with Nerut. As regards the term "neighbouring villages" he relied upon the words of the second alternative in the judgment of Mullick, J., in *Brij Behari Singh v. Sheo Shankar Jha* (1) where "the prevailing rate in the neighbouring village or villages" is mentioned and on the words found in the third alternative "if no one prevailing rate can be found in any village." Whether in discussing this decision he was serious in such observations as :

"It is true that these rulings cannot supersede the provisions of clear sections on the subject, but the Hon'ble Judges of the High Courts have got the power to interpret law. It is not for Subordinate Courts to say that the interpretation so placed goes to supersede the law on the subject, nor can any member of the Bar be heard in advancing such a contention. Their Lordships might have had very good reasons for holding that one mauza was quite sufficient for determining the prevailing rate"

is not easy to determine. He ignored old nakdi holdings and privately commuted rent and considered that

"once bhaoli holdings have been commuted to

nakdi there can be no difference between old nakdi and new nakdi holdings, at least under the Bengal Tenancy Act."

As a holding (the composition of which is unknown) held by one Narayan in Onda had been commuted at Rs. 8 per bigha in 1915 there was, he thought, no reason why other tenants of Onda should hold lands at (presumably an average of) only Rs. 3 to Rs. 5 per bigha (actually Rs. 2-8-0 to Rs. 5-4-0) even if, as a third commissioner had reported "irrigation and gilandazi facilities have partially failed here and there." As however the khata had begun to silt up owing to the negligence of the landlords he restricted the enhancement under S. 30 (b) as already indicated.

The learned District Judge in appeal negatived the contention that the defendants and other raiyats holding at a lump rental did not hold at a rate of rent per bigha. If he meant that the average rent per bigha of the holding is a "definite rate of rent" he was clearly in error: *Radha Krishnaji v. Haricharan Ahir* (3). The basis of S. 30 (a) is the division of the lands of a village into classes to each of which is attached a rate of rent; if a holding is held at a lump rental it must be the aggregate of the rents of the different plots computed in accordance with the rate appropriate to the class of each plot. On the facts found there cannot be a rate of rent for the lands of these holdings though there may be several separate rates of rent according to class of land.

As to the determination of the prevailing rate of Nerut, he held generally that the Act could not be taken to contemplate that the commuted rents should be taken as a guide for rents of raiyats holding at a cash rental and he pointed out the inequitable results which would, as in the present instance, be arrived at upon any other view. He further held, distinguishing *Brij Behare Singh v. Sheo Shankar Jha* (1), that that decision contained nothing to justify the restriction of the inquiry as to prevailing rate of rent to one out of a number of villages adjoining the village where the holding lies, and found on the evidence that Rs. 8-2-0 per bigha even if a prevailing rate in Nerut was "not in any real sense a prevailing rate for the neighbourhood,"

(3) A. I. R. 1930 Pat. 332=126 I. C. 297=9 Pat. 803.

(2) [1868] 9 W. R. 83.

and the lands in suit could not equitably be enhanced up to the rate of Nerut. As to S. 30 (b) he found that there was no reason to refuse enhancement on the ground of neglect of irrigation works and granted enhancements as already indicated.

On behalf of the landlord Mr. Khurshaid Husnain assails the finding in appeal that even if there is a prevailing rate in the neighbouring villages it has not been correctly determined and impugns the reasons given by the appellate Court for the contrary view. Mr. A. K. Roy for the respondents supports the finding and further contends that a portion of a neighbouring village or even the whole of it cannot satisfy the expression "neighbouring villages" in S. 30 (a) and that in any case there was sufficient reason for the old nakdi raiyats of Onda "holding at so low a rate" as compared with the raiyats whose rent was commuted from bhaoli in 1910 in Nerut. He further lays stress upon S. 31 (f) of the Act pointing out that the holdings of the defendants are held on lump rentals and include lands of different classes each as alleged by the landlord with a prevailing rate of its own, whereas the inference from the single rate at which a commutation was made in Nerut in two of the three pattis (and not in the third) would be that the lands situated therein were all of one class. In my opinion the contentions on behalf of the respondents cannot be gainsaid.

It has been held in *Kamala Prasad v. Bankey Prasad Singh* (4) that the existence of a lump rental does not take a holding out of the operation of S. 30 (a). Yet if in such circumstances that enactment is not quite inoperative in practice, the landlord in Bihar who hopes to establish the prevailing rates of rent is, as experience shows, very decidedly an optimist. In such a case he can hardly succeed except by the application of S. 31 (f) which is notoriously difficult. And as set out in the latest decision on the subject, *Radha Krishnaji v. Haricharan Ahir* (3), the expression "prevailing rate" of rent means a definite customary rate per bigha current in the village at which a particular class of land is held and, as has been pointed out above, does not mean an average rate per bigha for that class and still less for all lands.

(4) A. I. R. 1929 Pat. 702=124 I. C. 390.

Before I enter upon the chief question of law involved, it falls to be indicated that it would be surprising if in the circumstances set out above the Sub-Deputy Collector's estimate of the prevailing rate in Nerut accepted by the Munsif could be accurate even for that village. It appears to be based on some conception of S. 31-A, the principle of which cannot be applied to an area in respect of which the provision has not been notified: *Radha Krishnaji v. Haricharan Ahir* (3). In addition it would, even if accurate for Nerut, prima facie be inapplicable to these holdings of Onda both because the latter contain several classes of lands and because the lands of the commuted holdings in Nerut, as reported by the Sub-Deputy Collector, compare favourably in all relevant respects with the lands in Onda. But since the District Judge apparently missed the Munsif's serious error of record in this regard to which allusion has already been made, and also the fact that there are various classes of land in the holdings, a remand to the lower appellate Court might, but for the fact that the appeal fails on another ground, have been necessary for determination of the question whether lands in these holdings or some lands in them or any of them are really of a similar description and with similar advantages to those of the commuted area in Nerut.

In my judgment the lower appellate Court has correctly held that the view of the Munsif is not really supported by the directions in *Brij Behare Singh v. Sheo Shankar Jha* (1) by which he considered himself to be bound. In that decision the precise signification of the expression "the prevailing rate paid . . . in neighbouring villages" does not appear to have arisen for consideration and in the directions given expressions were employed which go further than the enactment warrants, unless conceivably in the peculiar case where only one neighbouring village exists, as is not the case with Onda. The expression contemplates a rate of rent (doubtless reminiscent of the pargana rate), which prevails in the neighbourhood generally and not merely in one neighbouring village or area of such village, least of all when in the latter case it is fortuitous. The legislature had in view the normal circumstances of the neighbouring villages as a whole and contemplated that it should

be ascertained by local inquiry whether there exists therein a definite customary rate per bigha for land of a similar description and with similar advantages to particular land of the holding in suit. If such a rate of rent does not exist in those villages for that class of land, there is no prevailing rate for it in those villages such as is contemplated by S. 30 (a), and the landlords' application must fail. A rate of rent prevailing in one neighbouring village is not the prevailing rate for neighbouring villages. And for the best of reasons, a single neighbouring village may well have its own fortuitous circumstances, whereas a comparatively safe inference can be drawn as to the prevalence of a rate which obtains in several villages for land of a similar description and with similar advantages. In *Radha Krishnaji v. Haricharan Ahir* (3) their Lordships in remanding the case definitely directed that the commissioner was to ascertain whether there was in the neighbouring villages a definite prevailing rate of the kind described. It is clear therefore that the District Judge committed no error of law in determining that the prevailing rate had not been correctly determined.

I am further inclined to accept the view that in any event, if the rate of rent was or, as in most of these cases, the rates of rent were, found to be low in comparison with a prevailing rate or rates if such exist, for lands held on a cash rental which is the result of commutation of produce rent, the defendants would, if there was no other evidence available, have "sufficient reason for holding at so low a rate." Indeed it seems to me doubtful whether a rate of rent based upon such commuted rents can at all be said to exist within the meaning of S. 30 (a).

Mr. Baldeo Sahay, who replied for the petitioners, urged that a still further commission should be issued under S. 31 (b). But the issue of a commission is discretionary and it is abundantly clear from what has transpired that it could serve no useful purpose. The appeals therefore fail and must be dismissed with costs.

As regard the cross-objections, it is correct that the liability to pay road cess in addition to the enhanced rent ought not to have been inserted in the decree since the point is not mentioned in the

judgment. So, although there is no substantial prejudice since the payment is provided for by statute, it must be removed. To this extent all the cross-objections are allowed. As to the objections already enumerated in which there were enhancements at three annas one pie or four annas eight pies according as the land was exclusively dhanhar or exclusively bhit, no point of law arises in second appeal and they must, except as above, be dismissed.

In respect of the remaining appeals the learned District Judge gives as the reason for an enhancement of four annas that the holdings are approximately half dhanhar and half bhit. But this reason is meaningless and the figure cannot be defended. Even if it were an average of the two maxima, as it is not, the implication would be that the aggregate rents for the dhanhar and for the bhit are equal and consequently (in view of the finding as to area) the rent per bigha for dhanhar is the same as the rent for bhit which is contrary to all experience. It is in reality an introduction under S. 30 (b) of the old fallacy of average rent so rampant under S. 30 (a). The fact is that unless the landlord is able to distinguish in lump rental the aggregate rent for bhit and the aggregate rent for dhanhar (and this is not done in the present instance) it is impossible to predicate that an enhancement exceeding the lower of the two rates is not beyond the admissible maximum and therefore illegal (unless conceivably where it is very slightly over the lesser maximum.) Actually there is no evidence as to the proportion in which rent for dhanhar and rent for bhit enter into the lump rental and it may obviously vary endlessly even when the areas are equal. In the present instance calculation shows that a rent per bigha approximately of Rs. 4-8-0 is assumed by the lower appellate Court for bhit and of Rs. 2-8-0 for dhanhar for which assumption there is no warrant. Where, as in this instance, the landlord has failed to indicate any particular portion of the lump rental as derived from the class of land (here bhit) in respect of which the higher maximum rate of enhancement is allowable, no rate above the lower rate of enhancement can be certainly legal. A conjectural figure to be permissible must be within the limit of certain legality. I would guard

myself against appearing to hold that in no case could an enhancement above the lower maximum be legal ; for instance, there might conceivably be evidence establishing that the proportion of the rent to which the higher maximum enhancement would be applicable, could not be less than a definite part of the lump rental and the higher maximum might be applied to that part only. Here however there is no such evidence and even if in all cases it is not physically impossible to apply the two different rates of enhancement or an intermediate rate, at any rate in the present instance the landlord, on whom the onus lay, has adduced no evidence on which anything above the lower rate could be decreed. I would therefore allow in part the cross-objections in Appeals Nos. 1648, 673 and 675 to 678 inclusive, reduce the enhancement to three annas one pie in the rupee and direct parties to bear their own costs in the cross-objections.

Fazl Ali, J.—I agree.

S.N./R.K. Order accordingly.

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JWALA PRASAD, AG. C. J. AND
JAMES, J.

Dalip Narayan Singh and another—
Decree-holders—Appellants.

v.

Raghunandan Prasad — Judgment-debtor—Respondent.

Misc. Appeal No. 51 of 1931, Decided on 13th August 1931, against order of Dist. Judge, Monghyr, D/- 2nd February 1931.

(a) Hindu Law—Debts—Father — Debt incurred by father for family business—Sons acquiring benefits therefrom are personally liable—Court must specifically decide whether or not they are so liable.

Where in respect of a debt incurred by the father in a joint Hindu family for self and as guardian of his sons, the Court passes a decree against the sons also holding that the debt is binding on them having been contracted for family business and all the sons having been benefited therefrom, the Court practically holds that the sons are personally liable for the debt. It must however specifically decide at the same time the point whether the sons are personally liable or only their interest in the joint family property is liable. It is for the sons denying liability to show that the debt was not a family debt and did not benefit them: 2 *Pat. L. J.* 212, *Dist.*

(b) Execution—Decree binding.

An executing Court is bound to execute the decree as it stands and cannot go behind it.

[P 185 C 1]

S. M. Niamatulla and Roy B. B. Saran—for Appellants.

P. B. Ganguly and M. K. Mukharji—for Respondent.

Jwala Prasad, Ag. C. J.—This is an appeal against an order of the District Judge of Monghyr who in disagreement with the view of the Subordinate Judge allowed the objection of the judgment-debtor under S. 47, Civil P. C. with the consequence that the decree-holder is limited in the execution of his decree to proceed against the family property of the judgment-debtors and not against their person and property.

Defendant 1 for self and as guardian of his minor sons defendants 2 to 4, executed a mortgage bond on 7th March 1928. The plaintiff sued on the bond but claimed only a simple money decree giving up his lien over the mortgaged property. Defendant 1 is the father of defendants 2 to 4. Defendant 2 is his major son and defendants 3 and 4 are minors. Defendant 1 did not contest the suit. Defendants 2 to 4, the sons of defendant 1, only contested the suit and they denied the genuineness of the bond and the passing of consideration and pleaded that they were not liable to pay, as the loan was not contracted for the benefit of the joint family. The plaintiff's case was that the bond was executed for carrying on a contract business of the family and by the loan all the members of the family were benefited including defendants 2 to 4. The Court held that the bond was genuine and for consideration and that defendants 2 to 4, the sons of defendant 1, were liable inasmuch as they were benefited by it. The Court observed :

"At present it is enough to hold that the debt in suit is also binding on defendants 2 to 4 not only because they are the sons of defendant 1 living jointly with him but also because the debt was contracted for the conduct of the contractor's business which the family carried on for its living."

Upon this finding the Court passed a decree against all the defendants. It however did not decide whether the defendants were liable personally or only their interest in the joint family property was liable. The Court said :

"This is not the time for the consideration of this question."

Obviously the Court was wrong for it ought to have decided that point at that stage and in fact by its finding that the debt was contracted for the benefit of the family the Court practically held that

defendants 2 to 4 were also personally liable for the debt. Upon this judgment a decree was passed making all the defendants liable for the debt.

An executing Court is bound to execute the decree as it stands and cannot go behind it. As such all the defendants including defendants 2 to 4 are personally liable to pay up the decretal amount. Defendant 2 whose salary was sought to be attached in execution of the decree raised the contention that he was not personally liable but that the family property should have been proceeded against. His contention is that the Court which passed the decree left the question open. At best he is entitled to show that he is not personally liable. He has not shown that. On the other hand the judgment shows that he was liable to pay the debt not only upon the ground that as a son it was his pious duty to pay the debt of his father but as a matter of fact he was benefited by the loan. He does not show that the debt was not a family debt and did not go to benefit him. The decision relied upon in the case of *Nathuni Sahu v. Baijnath Prasad* (1) does not help defendant 2 inasmuch as in that case it was found as a fact that the debt was not incurred for the benefit of the sons and they were made liable only upon the ground of their pious duty to pay the father's debt unless they could show that it was immoral or illegal. In that very case a distinction was drawn between the case where the debt is proved to be actually for the benefit of the sons and a debt which is shown not to be for their benefit but that they are made liable only under the doctrine of pious duty.

We therefore set aside the decision of the Court below and restore that of the Subordinate Judge. The appeal is decreed with costs.

James, J.—I agree.

R.M./R.K.

Appeal decreed.

(1) [1916] 2 Pat. L. J. 212=39 I. C. 352.

A. I. R. 1932 Patna 185

ROWLAND, J.

Raj Nandan Missir and another—
Petitioner.

v.

*Cheddi Thakur—*Opposite Party.

Criminal Revn. No. 257 of 1930, Decided on 11th June 1930, against order of Subdivl. Officer, Muzaffarpur, D/- 31st March 1930.

(a) **Criminal P. C. (1898), S. 145 (1)—Jurisdiction—Likelihood of breach of peace is sufficient.**

The Magistrate, having found that khas possession did not pass to the applicants under the proceedings of the civil Court, does not act without jurisdiction under S. 145; therefore his proceedings are not irregular. The fact of a likelihood of a breach of the peace is sufficient to give the Magistrate jurisdiction, the weight to be attached to a previous order of a civil or criminal Court is a question for consideration of the Magistrate; 1 *Pat. L. J.* 326, *Foll.* [P 187 C 1]

(b) **Criminal P. C. (1898), Ss. 435 and 439—High Court can interfere in cases of erroneous finding by Magistrates.**

Since the amendment of the Code of Criminal Procedure in 1923 the High Court has power under Ss. 435 and 439 to interfere in the course of its ordinary revisional criminal jurisdiction with any erroneous orders passed in proceedings under S. 145. It is therefore no longer necessary to excuse such interference with fallacious reasoning on the question of jurisdiction. The High Court's powers of superintendence are not limited to cases where the error is one of jurisdiction only but they extend to and cover cases of erroneous finding. Where therefore there is a gross error by the Magistrate on the fact of possession the High Court feels compelled to interfere, not because the Magistrate acted without or beyond jurisdiction but because he came to a wrong finding—so wrong that interference is inevitable in the interests of justice: (*Case law discussed*).

[P 188 C 1]

K. Husnain and S. Ali Khan — for Petitioners.

L. K. Jha—for Opposite Party.

Judgment.—This is an application to quash an order dated 21st March 1930 drawing up proceedings under S. 145, Criminal P. C., in respect of two plots bearing numbers 9 and 28.

The proceedings originated in a report dated 6th January 1930 by a chaukidar Gena Kurmi at police station Muzaffarpur of likelihood of a breach of the peace on which the Sub-Inspector on 13th January 1930 submitted a report to the Magistrate recommending action under S. 144. Notices were issued and the parties appeared on the 22nd January. The subdivisional officer on 23rd January 1930 made an order to draw up a proceeding under S. 145, Criminal P. C. The peti-

tioners objected to this order on the ground that their master whom they represent holds a decree against the opposite party dated 16th August 1928 in respect of the disputed land and other lands in execution of which possession was delivered to the petitioner's master on 10th June 1929. He moved the Sessions Judge who referred him to the District Magistrate suggesting that proceedings might appropriately be taken under S. 144 or S. 107 and pointing out that the District Magistrate had power to change the proceedings if he agreed. Meanwhile the Sessions Judge kept the application before himself pending. The District Magistrate on 2nd February without passing any definite orders referred the matter back to the subdivisional officer suggesting that the subdivisional officer could deal with the matter summarily under S. 144 or, failing that, could consider the propriety of proceeding under S. 145. The subdivisional officer held a local inquiry and on 21st March 1930 adhered to his previous order whereupon the petitioners again moved the Sessions Judge who rejected their application on 22nd April 1930. Proceedings were thus delayed for three months from 23rd January to 22nd April by a desultory discussion of the procedure to be followed, the District Magistrate and Sessions Judge both having suggested to the subdivisional officer the propriety of proceeding otherwise than under S. 145; but neither the District Magistrate nor the Sessions Judge being prepared to pass any definite order.

It is a fact that the petitioner's master Saiyid Zahur Hussain holds a decree obtained by him after contest up to the High Court in a title suit in which Chedi Thakur was defendant 1. It appears not to be denied that delivery of possession was taken out and that possession was delivered. The Magistrate's explanation shows that he is disposed to hold that physical possession as against the opposite party did not pass by the delivery of possession. In that suit the petitioners' master prayed to recover possession alleging his title and stating that possession was being interfered with by defendant 1, that is Chedi Thakur, the present opposite party. Chedi Thakur disclaimed all present connexion with the property in suit saying that he had possessed only thika right and his thika has

terminated. In the present proceedings Chedi says that he was interested in the disputed property not only as a thikadar but as a raiyat and that his interest as raiyat continued in contradiction of his own written statement in the suit. The plaintiff's attack on this defendant had been an assertion that defendant had no right whatsoever to interfere with the disputed land in any capacity and the defendant did not contest that proposition. The suit was decreed for khas possession and the delivery of possession purported to be a delivery of khas possession under O. 21, R. 35, Civil P. C.

The Magistrate's order and explanation indicate that he is disposed to hold that physical possession as against the opposite party (Chedi Thakur) did not pass by the delivery of possession.

It is contended that when delivery of possession was given under O. 21, R. 35, Civil P. C., it was not open to the Magistrate to hold that possession did not pass, that it was not open to the Magistrate to hold that there was any dispute and that his plain and sole duty was to maintain the possession of the decree-holders which he should have done in proceedings under S. 144 or S. 107. For these contentions reliance has been placed on *Behari Gir v. Bhuneshwari Kuer* (1), a decision based on the Calcutta cases of *Doulat Koer v. Rameswari* (2) and *Kunj-behari Das v. Khetra Pal Singh* (3). The decision first cited was the decision of a single Judge as was also *Kamla Prasad Singh v. Gobind Sahay* (4) which has also been cited and these decisions are no doubt entitled to respect. I consider however that it is incumbent on me to express my own view of the law and not blindly to follow those decisions, more particularly as they seem difficult to reconcile with the Full Bench decision of *Parmeshwar Singh v. Kailaspati* (5) and that of *Bhulan Raut v. Kumar Rai* (6). Moreover, the view of law taken in the two Calcutta decisions which were followed in the two cases relied on for the petitioner has been rejected as erroneous

(1) A. I. R. 1920 Pat. 633=5 Pat. L. J. 104=21 Cr. L. J. 200=54 I. C. 984.

(2) [1899] 26 Cal. 625=3 C. W. N. 461.

(3) [1901] 29 Cal. 208=6 C. W. N. 38.

(4) A. I. R. 1922 Pat. 13=71 I. C. 785=24 Cr. L. J. 241.

(5) [1916] 1 Pat. L. J. 336=17 Cr. L. J. 369=35 I. C. 801 (F.B.).

(6) A. I. R. 1924 Pat. 509=75 I. C. 535.

by a Full Bench of the Calcutta High Court in *Agni Kumar Das v. Mantazaddin* (7).

Beginning with the words of the section itself the conditions which give the Magistrate jurisdiction to take proceedings are stated in S. 145, Cl. (1) in very broad terms :

"Whenever a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land."

The Full Bench of this Court and the Full Bench of the Calcutta High Court agree in holding that these words have their natural meaning.

In certain decisions of the Calcutta High Court it has been held that to give a Magistrate jurisdiction under this section the "dispute" must be a bona fide dispute or a dispute which has not been already decided inter partes by a competent Court. The correctness of this view is examined by Rankin, C. J. (at p. 301 of 56 *Cal.* and following) in *Agni Kumar Das v. Mantazaddin* (7) and his Lordship held that:

"the doctrine that a Magistrate's jurisdiction is limited in the manner contended for is wholly without warrant in the statute and represents an unworkable and unreasonable attempt to thrust into the section qualifications and conditions which are rejected by its letter no less than its general intention,"

and that

"these qualifications and conditions have their sources in a misapprehension of certain principles of law" (at p. 303 of 56 *Cal.*).

In the Patna Full Bench decision, *Parmeshwar Singh v. Kailaspati* (5), Chamber, C. J. said that the Magistrate having found that khas possession did not pass to the applicants under the proceedings of the civil Court was not acting without jurisdiction and his proceedings were not irregular, and Roe, J. considered that the fact of a likelihood of a breach of the peace was sufficient to give the Magistrate jurisdiction; the weight to be attached to a previous order of a civil or criminal Court was a question for consideration of the Magistrate. Sharfuddin, J., said:

"A civil Court decree in favour of a party will become infructuous if the Magistrate interferes with it; but the Magistrate is not bound to maintain it blindly."

On the other hand Rankin, C. J. in *Agni Kumar Das v. Mantazaddin* (7) pointed out that

"it is true that if on a given date the plaintiff has been put into possession by the civil

Court then on that date the plaintiff got possession as against the defendant . . . it is an error to hold in such cases that the decree-holder was never in possession or to ignore the delivery to him"

and attributed interference by the High Court in cases where the Magistrate had interfered with or nullified a civil Court's decree to the Magistrate having

"come to a wrong finding on the fact of possession by reason of this error, (at p. 311 of 56 *Cal.*)"

At this point I may refer to the discussion by Roe, J., in *Parmeshwar Singh v. Kailaspati* (5) of the case law on the question of the scope of the Court's power of superintendence. It was taken as settled law that the High Court's power of superintendence was confined to cases in which a Court had acted without jurisdiction or in excess of jurisdiction or had refused to exercise a jurisdiction vested in it by law. Chamber, C. J., endorsed the rule laid down in a series of decisions that the High Court would interfere in such a case where the Magistrate had acted without jurisdiction or exceeded his jurisdiction or refused to exercise jurisdiction or usurped jurisdiction. His Lordship said:

"It is not sufficient to show that there has been an erroneous decision on a question of law or fact."

That being the general practice of all the Chartered High Courts, we may seek in it the explanation of those decisions in which it has been stated that a Magistrate had no jurisdiction to interfere with the civil Court's decree.

Rankin, C. J., in *Agni Kumar v. Mantazaddin* (7), refers to *Chatrapal Singh's* case (8) as one in which the Magistrate having ignored the delivery of possession came to a wrong finding as to the fact of possession and similarly *Bholanath Ghose's* case (9) was a case of wrong finding of fact that a person evicted from possession was still in possession. But interference on the ground of such an erroneous finding was difficult to justify if the High Court's powers of superintendence were limited to cases where the error was one of jurisdiction. So we find in such cases as *Doulat Koar v. Rameswari Koeri* (2), *Kunjbehari Das v. Khetra Pal Singh* (3) and *Atul Hazra v. Uma Charan Chondgar* (10), the High Court assuming

(8) [1879] 5 C. L. R. 200.

(9) [1880] 7 C. L. R. 516.

(10) [1916] 17 Cr. L. J. 182=33 I. C. 822.

(7) A. I. R. 1928 Cal. 610=113 I. C. 181=56 Cal. 290 (F.B.).

a jurisdiction to interfere by denying the Magistrate's jurisdiction to pass the order and by the fiction that though a breach of the peace was imminent there was no dispute within the meaning of S. 145 (1). The real fact of the matter was that in those cases as indicated by Rankin, C. J., in the passage above cited there was a gross error by the Magistrate on the fact of possession, an error so gross that the High Courts found themselves impossible to tolerate it without interference but because of the rule of practice laid down they justified their interference in several cases by the erroneous proposition that a Magistrate had no jurisdiction. I may refer to an observation of Sharfuddin, J., at p. 344 in the Full Bench decision:

"In the case of a civil Court decree of very recent date where there is no evidence to show disturbance or change of possession since the decree the Magistrate is bound to respect the civil Court decree and if he does not do so he acts without jurisdiction."

This observation does not appear to have had the concurrence of the other two Judges constituting the Full Bench. It would appear to have been the learned Judge's view that a Magistrate had jurisdiction to take up proceedings under S. 145. He having done so had jurisdiction to decide them in one way and not to decide them in another way. With great respect I am unable to accept that observation as a correct statement of the law. If a Magistrate has jurisdiction to decide a case he acts with jurisdiction both when he decides it rightly and when he decides it wrongly as pointed out by the Privy Council in *Malikarjun v. Narhari* (11), "a court has jurisdiction to decide wrong as well as right." Fortunately since the amendment of the Code of Criminal Procedure in 1923 the High Court has power under Ss. 435 and 439 to interfere in the course of its ordinary revisional criminal jurisdiction with any erroneous orders passed in proceedings under S. 145. It is therefore no longer necessary to excuse such interference with fallacious reasoning on the question of jurisdiction. As I am in full agreement with the reasoning of the learned Chief Justice in *Agni Kumar Das v. Mantazaddin* (7) I need not further argue the point that the Magistrate had juris-

diction to institute proceedings under S. 145. In the words of that judgment:

"To say that when the claim of one party is mala fide or is unreasonable the Magistrate cannot act under S. 145... is... bad law. If the party which seems to have no case of title is out of possession there can be no reason why the other party's possession should not be declared."

It follows from what I have said above that not only has the Magistrate jurisdiction to act under S. 145 but even if he decides that Chedi Thakur was not dispossessed by the delivery of possession that decision will still be a decision which he has jurisdiction to make. It may be a decision so grossly erroneous that this Court would have no option but to interfere in revision but the time for that has not yet come.

The application is dismissed.

K.N./R.K. *Application dismissed.*

A. I. R. 1932 Patna 188

SCROOPE, J.

J. Agarwala—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 615 of 1931, Decided on 14th January 1932, against order of Sess. Judge, Manbhum-Sambalpur, D/-13th October 1931.

(a) **Factories Act (12 of 1911), Ss. 41 and 34—Joint trial of manager and occupier for failure to report accident is not bad in law—Criminal P. C. (1898), S. 5 (2).**

Section 41 lays down that in case of breach of certain provisions, the liability is fastened on the occupier irrespective of the actual offender. S. 34 is the section which makes the manager liable for failure to report an accident, and S. 41 the occupier of the factory and the reference to the manager in the latter section emphasizes his joint and several liability along with the occupier. Such joint and separate liability could not be enforced in two separate trials. This is a particular provision of the Factories Act and is one of the cases contemplated by sub-Cl. (2), S. 5, Criminal P. C., and hence the joint trial of the manager and occupier of a factory for failure to report an accident is not bad in law. [P 189 C1,2]

(b) **Criminal P. C. (1898), S. 239 (c)—Factories Act—Offences under, are of same kind.**

Offences under the Factories Act are offences of the same kind within the meaning of S. 239. [P 189 C 2]

S. P. Verma—for Petitioner.

Manzar for Asst. Govt. Advocate—for the Crown.

Judgment.—The petitioner, Mr. J. Agarwala, has obtained a Rule from this Court against his conviction under Ss. 41 (h) and 41 (j), Factories Act. He was tried along with Mr. Rakhit for offences

(1) [1900] 25 Bom. 337=27 I. A. 216=7 Sar. 739 (P. C.).

under these sections and they were sentenced to pay a fine of Rs. 100 each under S. 41 (h), and they were sentenced to pay a fine of Rs. 100 each under S. 41 (j). On appeal to the Sessions Judge of Purulia the separate sentences of fine were set aside and it was directed that the fine in each case should be jointly payable as laid down in S. 41. The case for the prosecution was that the petitioner, Mr. Agarwala, was the occupier of the Tatanagar Foundry at Jamshedpur. The other person with whom he was tried, Mr. Rakhit, was the manager of the factory. These facts are not disputed now, nor is it disputed that when the Inspector of Factories inspected the factory in June last he found that there was no register of workers maintained in the factory as required by S. 35 of the Act. It was also discovered that there had been two serious accidents in the factory, but no notice had been sent to the authorities as required under S. 34. Mr. Agarwala, who is now the petitioner and with whose offence alone we are now concerned, pleaded that he was not the occupier of the factory and he could not therefore be guilty of any offence. Both the lower Courts have found that in fact he was the Managing Agent of the factory and in fact had control of the factory and was an occupier within the meaning of the Act and Mr. Verma for the petitioner does not dispute this finding now. But his first contention is that under S. 34 it is the duty of the manager to give information about accidents, and not the duty of the occupier and as no duty has been cast on the occupier by this section he should not have been made jointly liable with the manager. But S. 41 is to my mind perfectly clear.

It lays down that in case of breach of certain provisions, and it is not disputed here that these provisions have been infringed, the liability is fastened on the occupier irrespective of the actual offender. S. 34 is the section which makes the manager liable for failure to report an accident and S. 41 the occupier of the factory, and the reference to "the manager" in the latter section emphasizes his joint and several liability along with the occupier. The next point taken was that the joint trial of the petitioner along with Mr. Rakhit is bad, but I do not see any substance in this when S. 41 (j) makes them jointly and severally liable.

Such joint and separate liability could not be enforced in two separate trials. This is a particular provision of the Factories Act and is one of the cases contemplated by sub-Cl. (2), S. 5, Criminal P. C. The other argument on this point was that assuming that there could be a joint trial of the petitioner along with Mr. Rakhit for each separate offence they could not be jointly triable for both offences at the same time. In other words the contention amounts to this: that there should have been two trials of both the petitioner and Mr. Rakhit for the two offences. S. 239 (c), Criminal P. C., answers this argument. In my opinion the offences under the Factories Act are offences of the same kind within the meaning of that section. The petition must therefore be rejected.

K.N./R.K.

Petition rejected.

A. I. R. 1932 Patna 189

COURTNEY-TERRELL, C. J. AND
ROWLAND, J.

Matte Mandal and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 262 of 1931, Decided on 24th February 1932, against decision of Addl. Sess. Judge, Santal Parganas, Dumka, D/- 8th September 1931.

(a) Criminal Trial — Title to property—Questions as to, when should be gone into by Courts stated.

The proper place for a finding on matters of title is in a regularly constituted litigation between the parties claiming title, and though cases may arise in criminal Courts where without deciding a question of title the matters directly under trial cannot be properly disposed of, it is desirable to limit one's findings as to title in criminal proceedings to those cases in which a finding is necessary and to those points only which the Court is compelled to determine.

[P 191 C 1]

(b) Penal Code (1860), S. 99—Right of private defence does not exist when there is time to take recourse to protection of authorities—Two parties deliberately going to defend their own rights—Which party begins attack is immaterial.

Where the party of the accused goes to the place knowing that they would meet with opposition and taking with them a large body of men to defeat that opposition and the party of the prosecution incidentally appear to have done exactly the same thing, it is clear that neither party can claim any right of private defence, and the assemblies of men on both sides were unlawful. It is not of much importance in the circumstances which side began the attack when both parties

contemplated a fight and prepared for it in advance: 35 Cal. 368, Ref. [P 191 C 2]

S. P. Verma—for Appellants.

C. M. Agarwala—for the Crown.

Rowland, J.—This is an appeal by 15 persons who have been convicted by the Additional Sessions Judge of Santhal Perganahs on 8th September 1931, on charges as below:

All the appellants S. 147, I. P. C.	9 months' rigorous imprisonment and fines of Rs. 100 each.
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Appellant 7 Dila-war, S. 304, I. P. C. for causing death of Sheik Kausar Ali.	3 years' rigorous imprisonment.
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Appellant 9 Atabul and appellant 15 Sakhawat, S. 325 for causing grievous hurt to Sheikh Ainullah.	18 months' rigorous imprisonment each.
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The sentences have been directed to take effect concurrently.

The prosecution case was that there had been dispute over fishery rights in the river Sunder at the portion known as Telia Bandh where there was a dam in the river for irrigation purposes and to prevent fish from escaping. The accused's party claimed to have a right of fishing in this bandh by virtue of an old settlement on payment of Rs. 4 annually. The settlement is said to have been made with a common ancestor of the principal accused and of Ainullah, but no document of lease appears to exist. The zamindar in 1336 made a settlement of the entire fishery right in the disputed water with Ainullah and again made settlement with him in 1338 on a rental of Rs. 41. The party of the accused considered this settlement to be an infringement of their right, and on 13th March 1931, they collected a body of men (50 or 60 in number according to the first information report but in evidence it appears Matte's party numbered 18) with the object of fishing in the stream and having made preparation to overcome any possible opposition. There was a report made to the thana by the chaukidar Ransi Hazra to the effect that a breach of the peace between the two parties appeared imminent. In the meanwhile there was in fact opposition to the accused's party offered by

Ainullah and others and a fight ensued out of which the charges arise. In the fight on the prosecution side Ainullah, Asghar, Zamiruddin, Kausar, Manullah and Ashraf received injuries, and on the side of the accused Matte, Sahadullah, Bohi, Sakrullah, Dilawar, Jamaluddin and Jahid were injured. Of the injuries on the prosecution party the head injuries on Ainullah were found to amount to grievous hurt, while Kausar received head injuries which caused his death in hospital on 7th April 1931.

The charge of rioting recites as to the common object of the unlawful assembly of accused "enforcing a right or supposed right to catch fish in the river Sunder." The Sub-Inspector receiving the report of chaukidar Ransi Hazra sent a head constable, Gauri Prasad Singh, and constable Sheikh Ismail to the place to prevent breach of the peace. They were still on their way to the place of occurrence when they met some members of the prosecution party who had been injured and were going to the police station. The head constable went on to the place and found some persons of the accused's side also to have injuries. He advised them to go to the police station also and informations were laid on behalf of the prosecution party (Ex. 2) by Deyali at 5 p. m., and on behalf of the accused's party by Matte Mandal (Ex. 16) at midnight. The police officers found foot marks in the mud at the river, marks of blood on the stumps of the paddy in the field, and three fish traps (pairas) were recovered from the house of accused Matte Mandal. Twenty-one witnesses were examined for the prosecution and eight for the defence. The first information of Deyali was to the effect that Sheikh Ainullah and his party were catching fish in the bandh when the accused's party came armed with lathis and assaulted the prosecution party, whereupon the accused's party began to fish.

The information of Matte Mandal was to the effect that the accused's party had gone to the bandh to fish when Ainullah and his partisans came armed with lathis and began to assault the accused's party who, in order to protect their rights and save their lives, used their lathis. It has transpired that it was the party of the accused, and not the party of the prosecution, who had

gone to fish in the bandh, and it was the party of the prosecution who had gone to prevent them. To this extent the information of the accused is more correct than that given by Deyali. Deyali says he was an eyewitness; Matte, accused was a participant and had received four injuries, one of which amounted to grievous hurt, by fracturing the left ulna bone. The prosecution witnesses deposed that their party merely protested against the taking of the fish by Matte and those with him and did not assault him. But having regard to the nature of the injuries on both sides the Sessions Judge held that there was a mutual and free fight in which men of both parties were injured. The Sessions Judge is obviously right.

The parties entered into evidence as to the fishery rights in Telia Bandh and the learned Sessions Judge held that Ainullah had taken settlement of the bandh from the landlord and that the right of the accused's party to fish in the bandh though entered in the village note was not shown by that note to be a permanent or continuing right. Now there is some evidence notably Ex. B, a petition dated 7th November 1930, filed by Ainullah before the Subdivisional Officer of Godda indicating that until the settlement was made by the landlord with Ainullah both parties jointly were in enjoyment of the fishery rights in the bandh, and it may be that if it was necessary for us to go thoroughly into the question of title we might find that the answer was not so clearly in favour of the prosecution party as the Sessions Judge thought; but the proper place for a finding on matters of title is in a regularly constituted litigation between the parties claiming title and though cases may arise in criminal Courts where without deciding a question of title the matters directly under trial cannot be properly disposed of, it is desirable to limit one's findings as to title in criminal proceedings to those cases in which a finding is necessary and to those points only which the Court is compelled to determine. In the present case the real question is whether the accused had any right of private defence, and on this point the restrictions imposed on that right by S. 99, I. P. C. are important:

"There is no right of private defence in cases

in which there is time to have recourse to the protection of the public authorities."

Now we have it from the chaukidar Ransi Hazra that he was informed by Ainullah that:

"he had taken settlement of Telia Bandh from the zamindar, but Matte Mandal was preparing to fish in it and when he (Matte) would go to fish he (Ainullah) would oppose him and in doing so there might be a breach of the peace."

Ransi Hazra further says that before going to the thana he had met Matte Mandal and told him what Ainullah had said, whereupon Matte replied that the property was his and Ransi might go to the thana, which amounts to saying that Matte did not intend to act on the warning given. The credibility of this evidence of Ransi Hazra was challenged but we find no reason to doubt it. The chaukidar appears to be an honest witness, and he impressed the Sessions Judge as such. That being so, the substantial fact is that the party of the accused went to the place knowing that they would meet opposition and taking with them a large body of men to defeat that opposition. The party of the prosecution incidentally appear to have done exactly the same thing. In the circumstances it is clear that neither party can claim any right of private defence, and the assemblies of men on both sides were unlawful. It is not of much importance in the circumstances which side began the attack when both parties contemplated a fight and prepared for it in advance: see *Kabiruddin v. Emperor* (1).

The only point remaining is whether each of the appellants is proved to have taken part in the riot and whether the specific charges against individuals are proved against them. The eyewitnesses are P. W. 2 Deyali, No. 7 Ainullah, No. 9 Manullah, No. 12 Asghar, No. 13 Ashraf, No. 15 Azmatullah, No. 17 Ranjit and No. 18 Gholtan. Six of the appellants had injuries and eleven of them, that is to say, all except Atabul, Amin, Babuli alias Bhagruli and Sakhawat have admitted their presence at the occurrence. The manner in which their identification was taken from prosecution witnesses might be improved on, several of the witnesses having said in general terms "the accused persons were present." However there is evidence against all the appellants and only one, namely, Amin has sought

(1) [1908] 35 Cal. 368 = 7 Cr. L. J. 256 = 7 C. L. J. 359.

to rebut it by examining witnesses to prove an alibi. The two witnesses examined are his uncle Sheikh Akbar residing in village Jhapania and Sabir a near neighbour of Akbar. Their evidence is indefinite as to date and they appear to be interested in this accused. Amin is mentioned in first information and in evidence by Deyali and Ainullah of whom Ainullah says that he was struck by Amin. Other witnesses have identified Amin along with other accused without naming him. The Sessions Judge was right to accept the prosecution evidence rather than that of the alibi witnesses.

In the result the finding of the Sessions Judge regarding all the accused must be affirmed, and the appeal dismissed.

The dispute is of such a nature that it seems likely that it may lead to further breach of the peace when the appellants and the combatants of the other party, who have been convicted in the counter-case, are set at liberty. The Subdivisional Officer will no doubt take steps to obviate such a danger in due time by a proceeding under Ss. 107, 145 or 147, Criminal P. C., as he may find appropriate.

Courtney-Terrell, C. J.—I entirely agree.

K.N./R.K.

Appeal dismissed.

*** A. I. R. 1932 Patna 192**

MACPHERSON AND SCROOPE, JJ.

Dina Nath Malla—Appellant.

v.

Dina Nath Gorain and others—Plaintiffs and Defendants—Respondents.

Appeal No. 557 of 1929, Decided on 6th July 1931, from decree of Addl. Dist. Judge, Manbhum, D/- 2nd October 1928.

*** Landlord and Tenant—Withdrawal of deposit by landlord under protest does not amount to recognition of tenancy of depositor—Chota Nagpur Tenancy Act, Ss. 211, 212—Evidence Act, S. 115.**

Where money deposited by a person claiming to be a tenant in execution of an ex parte decree for rent is withdrawn by the landlord under protest it does not amount to a recognition of tenancy as regards the person making the deposit. The depositor not having been induced by the landlord to change his position the principle of estoppel does not apply: 38 I. C. 366 and A. I. R. 1927 Cal. 817, *Foll.*; A. I. R. 1924 Pat. 669, *not Foll.*; (*Case law discussed.*) [P 194 C 2]

C. C. Das and S. C. Mazumdar—for Appellant.

S. M. Mullick and B. B. Mukherji—for Respondents.

Scroope, J.—Plaintiffs brought the suit out of which this appeal arises for a declaration that they and defendant 2 had a holding in village Lakhiabaid Upardih under defendant 1 who was its proprietor in Ghatwali Jaigir right, their case being that the interest of plaintiffs 1—4 was 5 annas 9p.; plaintiffs 5 to 7, 4 annas; plaintiffs 8 to 9, 3 annas and defendant 2, 3 annas 3p. They alleged that defendant 1, in collusion with defendant 2, had fraudulently obtained an ex parte decree for rent and had got the holding sold in execution. The first Court dismissed the suit holding that there had been no fraud and that though the plaintiffs were co-sharers as alleged with defendant 2 in the holding they had never been recognized as co-tenants of the holding by defendant 1.

On appeal the Additional District Judge reversed the decision of the Munsif in part; he agreed with him that the plaintiff's shares were as alleged in the holding, but that the name of defendant 1 alone stood in the books of the landlord, defendant 1, and that plaintiffs had made no effort to have their names recorded. He went on however to hold that as previously, when defendant 1 had obtained a rent decree against defendant 2 in respect of this holding, the plaintiffs had deposited in April 1916 the decretal amount in Court; and the amount so deposited had been withdrawn by defendant 1 it was not open to defendant 1 to say that he had not recognized the depositors as co-tenants of the holding and that his action amounted to a recognition of the plaintiffs as joint tenants with defendant 2. In the Courts below there was a dispute about the factum of this deposit and its withdrawal, but we must take the findings of the first appellate Court on that matter as final and they are that in an execution proceeding arising out of a decree for rent and cess for the years 1317 to 1320 the plaintiffs deposited the decretal amount and the amount was withdrawn by defendant 1 under protest, the execution case being dismissed on full satisfaction. The learned Additional District Judge granted a decree in part only as he held that a portion of the suit claimed land did not fall within the holding in question, and there is a cross objection against that finding by the plaintiffs-respondents.

The contest now in second appeal by defendant 1 centres round the effect of this withdrawal of the decretal amount and Mr. C. C. Das for the appellant relies very strongly on a decision of this Court in *Sheoprasad Lal v. Brahmdeo Lal* (1). In that case Atkinson, J., held that where a landlord decree-holder withdraws, under protest, money deposited by a transferee of an occupancy holding under S. 171, Ben. Ten. Act, he does not thereby recognize the transferee as his tenant. Except for the fact that that case is under the Bengal Tenancy Act, and this is under the Chota Nagpur Tenancy Act, the facts are the same. Defendant 1 here challenged the right of the plaintiffs to deposit, alleging that they were not his recorded tenants; and the Court's order was "he may withdraw the money under protest." The fact that defendant 1 was allowed by the Court to withdraw the money under protest has been overlooked by the learned Additional District Judge; at least it has not been referred to in the judgment. Mr. S. M. Mullick for the respondents contends on the other hand that this decision of Atkinson, J., was reversed by a Divisional Bench of this Court in the case of *Lala Barhmdeo Lal v. Sheo Prasad Lal* (2), it is true that the decision was reversed but on a different ground. Plaintiff who was a transferee from defendant 2 sought for a declaration that the rent decree obtained by defendant 1 against defendant 2 was fraudulent and not binding on the plaintiff. Atkinson, J., held that although defendant 1 had withdrawn the deposit made by plaintiff under S. 171, Ben. Ten. Act, he had done so without prejudice and that this did not amount to recognition of the plaintiff as his tenant. He accordingly dismissed the suit. In appeal to this Court the Divisional Bench only went so far as to hold that the plaintiff was entitled to maintain the suit as a statutory mortgagee under S. 171, Ben. Ten. Act. They did not overrule the view taken by Atkinson, J., as to the effect of withdrawal under protest; in fact his decision was maintained that the plaintiff had not thereby become a tenant; apparently it was not even impugned; the landlord's position vis a vis the transferee was expressly left open. In that case Atkinson, J.,

discusses and differentiates the English case which is very strongly relied on by the respondents, namely, *George Henry Davenport v. Queen* (3). He points out that in that case the money was not only paid but received as rent whereas in the case before him, as in our case, the amount was paid to satisfy a decree, and was accepted by the proprietor without prejudice to his right to challenge the status of the maker of the payment.

"It seems to me" says Atkinson, J., "not only contrary to common sense but a violation of the true facts to contend that the person by his conduct has recognized the status of the transferee as a tenant."

With that view of the position I entirely agree. *Davenport's* case (3) was one relating to lessor and lessee; the ratio decidendi was that Courts always lean against forfeiture and the landlord was not allowed to take money on terms other than those of the party tendering. The position here is quite different.

In the Calcutta High Court however the weight of authority appears to be in favour of the contention of the respondents: vide *Jugalmonmohni v. Srinath Chatterji* (4), *Thomas Barclay v. Syed Hussein* (5) and *Kandarpa Narain v. Bindu Bashini Dasi* (6), which are cited by Mr. S. M. Mullick. A contrary view has however been taken in *Sukhchand Das v. Giridhari Das* (7), where it was held that the withdrawal of the amount by the landlord did not confer any right on the depositor in respect of the holding nor does it establish the relationship of landlord and tenant; and in *Fazoo Mia v. Sultan Ahmad Chaudhury* (8) Rankin, C. J., observed as follows:

"I doubt extremely whether it is true that a mere acceptance or withdrawal of this deposit would operate to oblige the landlord to recognize this tenant. But whether it be true or not—it is perhaps somewhat late in the day to abridge still further the rights of a transferee of a non-transferable occupancy jote in Bengal proper—increased latitude has been given in the matter of deposit under S. 170, but it is accompanied with an express provision that withdrawal of the amount by the landlord either under S. 170 or S. 174 shall not operate as an admission of transferability."

(3) [1877] 3 A.C. 115=47 L.J. P.C. 8=37 L.T. 727.

(4) [1910] 7 I.C. 477.

(5) [1907] 6 C.L.J. 601.

(6) A.I.R. 1928 Cal. 730=114 I.C. 657.

(7) A.I.R. 1926 Cal. 1215=97 I.C. 1016.

(8) A.I.R. 1927 Cal. 817=106 I.C. 143=55 Cal. 108.

(1) [1917] 38 I. C. 366.

(2) [1917] 2 Pat. L.J. 561=41 I.C. 237.

In my opinion this is the principle which should be applied under the Chota Nagpur Tenancy Act where Ss. 211 and 212 allow a very wide scope for deposits to avoid sales. It would be unfair to the landlord that the policy of the legislature to avoid sales of holding in Chota Nagpur should result in a corresponding disadvantage to the landlord in the shape of having tenancies thrust upon him, and this is an additional reason for accepting the view of Atkinson, J., which as I have shown does not by any means stand alone. I am therefore not prepared to accept the authority of the one Chota Nagpur case which has been cited for the respondents in this matter, namely, *Rajendra Narain Singh Deo v. Mahesh Chandra Chatterji*, A.I.R. 1924 Pat. 669. Another general consideration is that I am unable to see how the principle of estoppel can operate as it should if the contention for the respondents is to hold good. By the withdrawal of the deposit the status quo ante is preserved, whereas if the money is not withdrawn and the holding is sold the depositor loses his interest in the holding completely. He has not been induced to change his position by any action of the landlord. To turn to a more particular consideration, in the Chota Nagpur Tenancy Act we have S. 211, which in 1916 the date of deposit, ran as follows:

"1. If, before the day fixed for the sale of any tenure or holding in pursuance of S. 208, a third party appears before the Deputy Commissioner and alleges that he, and not the person against whom the decree has been obtained, was in lawful possession of, or had some interest in, the tenure or holding when the decree was obtained:

The Deputy Commissioner shall examine, such party according to the law for the time being in force relating to the examination of witnesses and if he sees sufficient reason for so doing and if such party deposits in Court or gives security for the amount of the decree, the Deputy Commissioner shall stay the sale, and shall after taking evidence adjudicate upon the claim:

Provided that no such adjudication shall be made if the Deputy Commissioner considers that the claim was designedly or unnecessarily delayed:

Provided also that no transfer of a tenure shall be recognized unless it has been registered in the office of the landlord or sufficient cause for nonregistration is shown to the satisfaction of the Deputy Commissioner.

2. The party against whom judgment is given by the Deputy Commissioner under sub-S. (1) may, at any time within one year from the date of the judgment, bring a suit in the civil Court to establish his right".

In the present case this is the procedure which the Deputy Collector should

have adopted, he should have adjudicated on the plaintiffs' right to make the deposit and then the party against whom the judgment was given by the Deputy Commissioner could within one year from the date of the judgment bring a suit in the civil Court to establish his right. He did not follow the procedure laid down, but allowed the decree-holder to withdraw the deposit under protest. For the reasons I have given I would hold that the withdrawal of the deposit in such circumstances by the landlord did not amount to recognition of the plaintiffs' tenancy. Had the Court decided in favour of the depositor then the decree would have been satisfied, and the landlord could have brought a suit within a year from the date of the judgment for ejectment or otherwise. I fail to see why he should be worse off because the Court has not adjudicated on the matter at all; that will be the effect of applying the principle of estoppel as laid down in the Calcutta rulings on which the respondents rely.

In this view of the case the decision of the learned Additional District Judge must be set aside on this point. The finding of the Munsif was that the plaintiffs had failed to prove that defendant 1 had ever recognized the plaintiffs as cotenants in the holding in question and the finding of the learned Additional District Judge also was that there was no evidence to show that the plaintiffs or their predecessors had ever made any attempt to have their names registered in the sharista of defendant 1. Fraud and collusion not having been established the decree of the first Court must be restored and the plaintiff's suit and cross-appeal dismissed with costs throughout.

Macpherson, J.—I agree, and in supplement to the judgment just delivered append some further observations. I fail to understand on what principle it can be held that a mere acceptance or withdrawal of a decretal amount in a rent suit can operate to oblige the landlord to recognize the depositor as a tenant. This view is also expressed by Rankin, C. J., in *Fazoo Mia v. Sultan Ahmad Chaudhury* (8). Even if the preponderating opinion in the Calcutta High Court is that under the Bengal Tenancy Act such withdrawal implies recognition, there is not the same reason of *stare decisis* for submitting to that view in this Province.

As is established in the judgment just delivered, precedent in this Court is to the contrary. Even if withdrawal of such a deposit had that effect in the area where the Bengal Tenancy Act is in force, the position under the Chota Nagpur Tenancy Act is altogether different. If in the former the tendency is not to "abridge still further the rights of a transferee of a nontransferable occupancy jote,"

to quote once more from the decision cited, the contrary position indisputably obtains in Chota Nagpur where the legislature sternly discountenances transfers of raiyati holdings save in most strictly limited circumstances. In the decision in *Rajendra Narayan Singh Deo v. Mahesh Chandra Chatterji*, A. I. R. 1924 Pat. 669, no reasons are given and the attention of the Court does not appear to have been drawn : (1) either to the policy of the legislature to reduce the number of sales of holdings in execution of rent decrees (which had become an extensive evil) by making it easy to have them set aside by a deposit of the decretal amount or to the wide terms of S. 211 in respect of a claim to deposit, which facts render it extremely unlikely that the legislature which had enacted Ss. 46 and 47, Chota Nagpur Tenancy Act, could have contemplated that an admission to tenancy would be implied in the withdrawal of a deposit even though it should not be under protest, or ; (2) to the decision in *Sheoprasad Lal v. Lala Brahmdeo Lal* (1) which was not set aside or apparently even assailed in the Letters Patent appeal reported in *Barhamdeo Lal v. Sheoprasad Lal* (2). In my opinion that case was not correctly decided.

Apart from these general considerations, it is inconceivable that in a case where the express order of the Court on the objection of the landlord that the depositor is not his tenant, was that the landlord was permitted to withdraw the deposit on the distinct understanding (for that is what the order amounts to) that he would do so without detriment to his claim as set out in his objection, a tenancy could be created by implication in favour of the depositor.

R.M./R.K.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1932 Patna 195

WORT AND FAZL ALI, JJ.

Kamakhya Narain Singh—Plaintiff—Appellant.

v.

Kiran Chandra Mukerji and others—Defendants—Respondents.

First Appeal No. 234 of 1928, Decided on 19th June 1931, against decision of Sub-Judge, Hazaribagh, D/- 14th August 1928.

(a) **Record of Rights—Entries in—Onus is on party alleging incorrectness.**

The entries in the Record of Rights being made after inquiry by experienced Revenue Officials are statutory evidence of great weight and the onus is on the party impugning their correctness to establish by cogent evidence that such entries are incorrect. An entry in the Record of Rights may be proved to be incorrect when the entire materials upon which it was based are before the Court and it is clear that these materials do not justify the entry.

[P 198 C 1]

(b) **Grant—Jagir—Grant of, in favour of three persons—Grantee dying heirless—Grantor in absence of custom to contrary cannot resume latter's share till other grantees or their heirs are alive.**

Where the grant of a jagir is made in favour of three persons, and one of the grantees dies heirless, the grantor, in the absence of a custom to the contrary (the onus of proving which lies on him), is not entitled to resume even the latter's share of the grant while the remaining grantees or their heirs are alive, even though the grantees may have been holding the grant as tenants-in-common.

[P 198 C 1]

S. M. Mullick and C. M. Agarwala—for Appellant.

P. R. Das, B. C. De and J. M. Ghose—for Respondents.

Wort, J.—This is the plaintiff's appeal in an action in which he claimed to resume a jagir or one-third thereof. The jagir was resumable on the extinction of the male heirs of the grantee and in this case the grantees were three persons, Hira Singh, Kuber Singh and Lallu Tewari. The original grant was made by Maharaja Mani Nath Singh under a sanad dated Baisakh Badi 8, 1848 Sambat to four persons, Dasraj Singh, Udit Singh, Dalel Singh and Parsuram Tewari. The son of Udit Singh died without issue and then the grant was renewed by the grant to the three persons I have named. Hira Singh was the grandson of Dalel Singh, Kuber Singh was the grandson of Dasraj Singh and Lallu Tiwari was the grandson of Parsuram Tiwari. The plaintiff is the proprietor of the Ramgarh Estate and the six villages with regard to which

the grant was made was known as Lot Barga.

One of the contentions of the defendants in the Court below was that the grant to the three persons mentioned dated Kartik Sudi 9, 1908 Sambat was not the creation of a new jagir but merely in continuation of the old. But this point has been decided in favour of the plaintiff, the Sub-Judge coming to the conclusion that the grant in 1908 was a new grant, this finding is not now contested by the defendants and indeed the facts as found by the Sub-Judge in favour of the plaintiff are not disputed by either party. One of the contentions of the defendant was that the grant was a grant of a joint tenancy. On the other hand the plaintiff contended that it was a tenancy-in-common. The basis of the plaintiff's claim was that Lallu Tiwari had died without leaving any male issue and therefore according to the custom of the estate, a one-third part of the jagir was resumable. It has been held that the son of Lallu Tiwari died in the year 1922 without any male issue. The Sub-Judge also decided that the grant was the grant of a tenancy-in-common.

The jagir is not now in the possession of the original grantee but no point arises in this connexion. Mr. Susil Madhab Mullick whilst agreeing that the grant was that of a tenancy-in-common, contends that the effect of the grant to those three persons was to give them a grant of three separate jagirs; that although they may have had unity of title they did not have unity of possession. Some reliance is placed on S. 45, T. P. Act. On the contrary Mr. P. R. Das, who appears on behalf of the respondents, argues that the fallacy of the argument of the appellant is contained in the assumption that it was a grant of one-third of the jagir to each of the three persons named and that such assumption could not be supported unless there had been a physical division of the property. He contends, for instance, that each of the grantees is liable for the whole rent which was indivisible and that the grant was made in lieu of services and that as the rent was indivisible so was the jagir. He admits that the grantees held by distinct titles but there was unity of possession; to quote a well known phrase "as none knoweth his own severalty", and that until partition each tenant-in-common has an estate in the

whole tenement. Reliance is placed on the case of the *United Dairies Ltd. v. Public Trustee* (1), where it was held that in a case of a breach of covenant to repair, the damages due to the breach of the covenant were recoverable in full from either of the tenants-in-common. One of the reasons for that decision was that in order to free the assignee of part of the lands from payment of the entire rent he must hold the part in physical severalty. Reliance is also placed on the decision in *Birendra Kishore v. Bhubneshwari* (2). In that case the action was an action in ejectment on the ground of the denial by a recorded tenant of the landlord's title. No such denial had been made by the unrecorded cosharers in the tenancy and it was held that, although a cosharer tenant who was recorded in the books of the landlord, might bind his cosharers for the purposes of the tenancy, yet when he repudiated the tenancy he must be taken to have acted beyond the scope of his authority. The judgment was based on the law of agency, but the learned Judges go on to say "there cannot be a forfeiture of the tenancy in part" and held therefore that the repudiation by one cosharer did not result in the forfeiture of the whole tenancy.

Some support to this argument addressed to us by Mr. P. R. Das on behalf of the respondents was given in the judgment, to which I have already referred to by Greer, J., in the *United Dairies Ltd. v. Public Trustee* (1). But the learned Sub-Judge appears to have decided the matter on entirely different grounds and in that, in my judgment, he was right. For this purpose it must be observed that the grant was oral and confirmed by an amalnama by the Maharaja addressed to the tenant and dated Kartik Sudi 9th, 1908 Sambat corresponding to 2nd November 1851, in these words:

"It is the order of Maharaja Shri Sambhu Nath Singh Bahadur to the Mahto tenants of villages. The villages in mukarrari to Hira Singh Jamadar, Kuber Singh Jamadar, Ram Tiwari Lallu Jamadar and peons etc., are given in lieu of allowance and on baiswan as per details given below. Total number of villages 6, you shall carry out their orders."

(1) [1923] 1 K. B. 469=92 L. J. K. B. 326=128 L. T. 768=39 T. L. R. 125=67 S. J. 199.

(2) [1912] 39 Cal. 903=15 I. C. 620.

Evidence was adduced by the plaintiff to prove the custom to resume on the failure of male heirs. The learned Judge in the Court below has come to certain conclusions regarding that evidence and these conclusions are not disputed nor indeed is the evidence referred to before us. The learned Judge points out that some of the witnesses for the plaintiff including Paryag Das, Tilakdhari Prosad and Bholanath Tewari deposed to the effect that jagirs in the Ramgarh Estate were resumable by the proprietor by virtue of a custom on the failure of direct male line of the original grantees. But the first witness attempted to prove that it was resumable even in the case of a share in the jagir, but the other two witnesses did not support him in this. Certain judgments also were produced in evidence to prove this custom. It is pointed out by the Sub-Judge that these do not assist the plaintiff as three of them which did refer to a custom to resume, make no mention of a custom to resume, a part of the jagir, nor indeed was it the case that there was such a custom to resume a share in the jagir. Nothing more was established before the Sub-Judge than that there was a general custom to resume on the failure of male heirs, and before us this is not disputed. The learned Sub-Judge came to the conclusion that the necessary implication was that, so long as there was a male heir in the direct line of any of the original grantees the jagir was not resumable. The only evidence to the contrary was that of Paryag Das, which was considered to be unreliable by the learned Sub-Judge, and he therefore decided that there was an entire failure on the part of the plaintiff to prove such a custom. It is important to point out these findings because they are not disputed by the appellant; but his arguments are based on what he contends to be the ordinary incidence of a tenancy-in-common. In my judgment however this view of the case cannot be supported.

I have already pointed out that the form of the grant was oral in the first place, followed by an order of the Maharaja to the tenants to recognize the grantees.

Now in the finally published Record of Rights the villages mentioned are Upar Barga, Heth Barga, Rau Rau, Raipura and Rabodh. The condition of the grant

is stated to be resumable by the Maharaja on the family of Hira Singh and Kuber Singh becoming extinct. The same form of entry appears in regard to the other villages. It is to be noticed that Lallu Tewari is not mentioned. The records were finally published in 1908, but it has been said that prior to that date Lallu Tewari disposed of his interest in some way although there is no evidence in the case on this matter.

There is no doubt that this entry was prepared in the presence of parties and that it would be difficult therefore for the plaintiff to contend that the condition of the grant was other than that expressed in the record.

I have already pointed out that the grant was an oral one and therefore apart from the effect of the Amalnama of 1908 Sambat, the question of the terms of the grant would be a question of fact.

It is contended that the decision in this case must largely depend on the terms of the grant itself. There was no evidence in this case apart from that to which I have already referred as to the custom, to resume a part of a jagir and to rebut the presumption which arises from the entry in the Record of Rights. It seems to me that on those grounds alone the plaintiff's case must fail. There is no suggestion in that entry that there is a custom to resume a part of the jagir, and indeed it is clear from the entry that the jagir is resumable only on the extinction or the failure of male heirs of the persons named therein.

It seems to me therefore that on these grounds this appeal must fail and be dismissed with costs.

Fazl Ali, J.—The only question to be decided in this appeal is whether the plaintiff is entitled to resume an undivided share in a certain jagir. The plaintiff's case is that the original grantees being three persons, namely, Lallu Tewari Hira Singh, and Kuber Singh, Lallu Tewari's share in the jagir is resumable because his male line has now become extinct. The defendant's reply to this is that, everything else being assumed in favour of the plaintiff the jagir is resumable as a whole and not in parts and that the plaintiff's right of resumption will accrue only when the male lines of Hira Singh and Kuber Singh also become extinct. On this point the Record of Rights undoubtedly supports the defen-

dant's case and the question is whether the plaintiff has succeeded in showing that it is not correct. I agree with my learned brother that the plaintiff has failed to do so. As was observed by the Privy Council in *Surendra Nath Karam Deo v. Kamakhya Narayan Singh* (3) the entries in the Record of Rights being made after inquiry by experienced Revenue Officials are statutory evidence of great weight and the onus is on the party impugning their correctness to establish by cogent evidence that such entries are incorrect. It was open to the appellant in this case to show that by the terms of the original grant even a portion of the jagir was resumable on the extinction of the male line of one of the jagirdars, but the *amalnama* Ex. 5, does not show this. The appellant has also as the learned Sub-Judge rightly finds in his judgment, failed to prove the existence of any custom under which only a share in the jagir originally granted to two or more persons might be resumed by the landlord on the failure of the direct male line or any one of the original grantees.

In fact not a single specific instance has been proved in which only a portion of the jagir was resumed upon the extinction of the male line of one of the grantees. In some cases, again, an entry in the Record of Rights may be proved to be incorrect when the entire materials upon which it was based are before the Court and it is clear that these materials do not justify the entry. In the present case however we do not know exactly upon what materials the entry was based and all we can say is that usually the Record of Rights is based upon a wide range of materials which may include the admissions of the parties. It is clear therefore that the plaintiff has adduced no cogent evidence in this case to rebut the Record of Rights. It is however argued on behalf of the appellant that the facts which are now admitted in the case are sufficient to show that the Record of Rights must have been wrongly prepared. It is contended that Hira Singh and Kuber Singh and Lallu Tewari, the original grantees, must be presumed to be tenants-in-common and owners of a third share each in the property and therefore once it is conceded that there is a custom entitling a

zamindar to resume a jagir on the failure of the male line of the grantee, it follows as a matter of law that the zamindar would be similarly entitled to resume a portion of a jagir where there are more than one grantee and where the male line of one of the grantees becomes defunct.

Now assuming that the three original grantees were tenants-in-common and that the share of Lallu Tewari was one-third the questions may yet arise: (1) as to what was the intention of the grantor at the time of the grant, and (2) if the case is to be decided on the basis of the custom pleaded by the plaintiff, whether he has succeeded in establishing a custom so wide that it not only covers a simple case where there being one grantee the jagir is resumable on the extinction of his male line, but also a case where on the extinction of the male line of one of several grantees, the landlord becomes at once entitled to his undivided share in the jagir. I have already said that there is no reliable evidence whatsoever on the record to prove the existence of the latter custom and I do not think that the latter custom is only a corollary of the former, so that if the one is established the other follows.

On the question of intention also the learned advocate for the appellant has certain difficulties of which he did not appear to be wholly unconscious. It was conceded by him in the course of his argument that his case would have been stronger and clearer if there had been three different grants in favour of three different persons each being in respect of one-third share in the villages which are the subject-matter of this suit. He also conceded that there are certain decided cases relating to mukarrari leases where it has been held that there being a single lease in favour of more than one person, the landlord's right of re-entry or resumption does not accrue so long as the male descendants of one of the lessees are alive. The case of *Gopal Ojha v. Ramadhar Singh* (4), may be distinguished on the ground that in that case the decision was based on the assumption that there was a joint tenancy and not a tenancy-in-common, but it will be useful to quote the following observations of Sir Ashutosh Mookerji in *Ram Nara-*

(3) A. I. R. 1930 P. C. 45 = 123 I. C. 145 (P. C.).

(4) A. I. R. 1925 Pat 228 = 32 I. C. 204.

yan Singh v. Chota Nagpur Panking Association (5) at p. 409:

"The objection as to limitation and recognition are equally fallacious. They are based on the assumption that upon the death of one of the two original grantees, the lessor becomes entitled to re-enter as to one-half of the property demised. This argument overlooks the elementary proposition that the lease would not terminate till the death of the survivor of the two lessees. There is a fundamental distinction between the question of the duration of the lease as a whole and the question of the devolution of the interest thereunder on the death of the first lessee. We are not now concerned with the question, whether upon the death of the first lessee, his heirs or his co-lessees would be entitled to occupy the demised premises. It is sufficient for our present purpose that the landlord was not entitled to re-enter till both the lessees were dead. In this view no question of limitation nor recognition arises."

I think therefore that the entry in the Record of Rights has been neither rebutted by any reliable evidence nor shown to be necessarily inconsistent with any of the facts proved in the case.

What appears to me to add to the difficulties of the appellant, as well as to complicate the case, is that a portion of the history of the jagir is shrouded in obscurity and even the appellant is not in a position to throw light on certain important matters. We do not know for instance when Lallu Tewari ceased to have connexion with the jagir. Ex. F is the plaint of a rent suit filed by the plaintiff's predecessor-in-interest against only Hira Singh and Kuber Singh in 1875, and the appellant is unable to explain why the suit was brought only against two of the original jagirdars in 1880. Lallu Tewari's name does not appear in the road cess return Ex. E. It also appears that between 1878 and 1924 different shares in the jagir were sold by auction and subsequently the defendants purchased different shares by means of sale deeds. To none of these transactions Lallu Tewari or any of his descendants was a party. We thus do not know on what terms Hira Singh and Kuber Singh held the jagir after Lallu Tewari ceased to have any interest nor is it easy to find out which of the defendants possess now how much of the original share of Lallu Tewari. In these circumstances the Record of Rights appears to me to be the only safe guide to determine on the most important incidents relating to the jagir and it cannot be lightly discarded especially when there is no clear and

cogent evidence proving it to have been wrongly prepared.

As his last resort the learned advocate for the appellant advances the somewhat ingenious argument that all that the entry in the Record of Rights means is that the whole jagir is not resumable until after the families of Hira Singh and Kuber Singh have become extinct, but it does not exclude the case now set up on behalf of his client as to the resumability of a part of the jagir. The simple answer to this argument is that if the fact was that a certain share in the jagir was resumable on the extinction of the family of one of the jagirdars the revenue officers who were in charge of the preparation of the Record of Rights would not have omitted to make such an entry or would have been content with only making an entry which is both incomplete and in a sense inaccurate.

For these reasons I agree with my learned brother that this appeal must be dismissed with costs.

K.N./R.K.

Appeal dismissed.

* A. I. R. 1932 Patna 199

WORT AND FAZL ALI, JJ.

T. Smith and another—Petitioners—Appellants.

v.

Kailash Chandra Chakravarty and others—Opposite Parties—Respondents.

Misc. Appeal No. 155 of 1929, Decided on 30th June 1931, from order of Sub-Judge, Dhanbad, D/- 25th May 1929.

* (a) Civil P. C. (1908), O. 21, R. 22—Application for substitution of legal representative is not proper notice under R. 22—Failure to issue proper notice renders auction sale invalid.

A notice calling upon the legal representative of a deceased judgment-debtor to show cause why he should not be substituted for the judgment-debtor is not a proper notice under R. 22 and the notice under the rule should call upon him to show cause why the decree should not be executed against him. Failure to issue notice in proper form renders an auction sale in execution proceedings invalid. [P 201 C 1]

(b) Civil P. C. (1908), O. 21, R. 22—Execution issued against judgment-debtor—On his death execution sought against his representatives—R. 22 applies.

Rule 22 applies not only to cases in which execution is issued for the first time against the legal representative of a party to the decree but also to cases where execution has been taken

out against a judgment-debtor and on his death during the pendency of the execution proceedings execution is sought to be taken out against his legal representatives: *A. I. R. 1914 P. C. 129, Rel. on.* [P 201 C 2]

(c) Civil P. C. (1908), O. 21, R. 22—Service of notice—Burden of proving nonservice is on judgment-debtor.

It is true that primarily it is for the judgment-debtor to prove that the notice was not served but it is open to the judgment-debtor to argue on the materials placed on the record on behalf of the decree-holder that there was no proper service of the notice. [P 202 C 1, 2]

K. N. Chaudhuri and *S. C. Mazumdar*—for Appellants.

H. P. Sinha—for Respondents.

Wort, J.— This is an appeal from an order of the Subordinate Judge of Dhanbad made on 25th May 1929 in execution proceedings. There was an application under O. 21, R. 90, Civil P. C., to set aside a sale held in execution. It appears that in the first place there had been an application on the side of the judgment-debtor for an adjournment with a view to calling evidence. That prayer was rejected. At the same time the learned Judge came to determine the question that arose under O. 21, R. 90. It appears that the objection on the part of the representative of the judgment-debtor was that no notice had been served under O. 21, R. 22. The learned Judge came to the conclusion on the basis of an affidavit sworn by a person who had served the notice that a notice had been served. He also decided that there was no evidence that the price which had been obtained in the sale was inadequate and therefore he dismissed the application under O. 21, R. 90.

Three points are raised by Mr. Chaudhuri on behalf of the representative of the judgment-debtor, first that there was no notice under O. 21, R. 22, secondly, that such notice as was issued was not properly served in accordance with the order for substituted service made by the Subordinate Judge and thirdly, that the learned Judge should not have rejected the application on the side of the judgment-debtor for adjournment of the hearing of the application. The second and third questions in the view I take of the case do not arise. As regards the argument relating to O. 21, R. 22, what appears to have happened was that when Mr. C. J. Smith the judgment-debtor died there was a petition on the part of

the decree-holder to substitute Mrs. D. Smith and Mr. T. Smith as the legal representatives of the judgment-debtor. Petitions to that effect were filed before the Subordinate Judge and ultimately, after the notice which has been questioned in this case had been served an order was made on 21st September 1928 substituting the persons I have named in place of Mr. C. J. Smith. O. 21, R. 22 provides that where an application for execution is made against the legal representative of a party to the decree the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him. It is admitted and cannot be denied, that no such notice as is contemplated by O. 21, R. 22 was ever served upon any person. I have already referred to the nature of the notice which in fact was alleged to have been served that being a notice for substitution and from one point of view it has been argued that because the decree-holder has done something in excess of what is necessary in the circumstances it cannot be held that the sale was invalid.

The learned advocate on behalf of the respondents in this case argues that O. 21, R. 22, applies only to those cases in which execution is issued for the first time against the legal representative of a party to the decree and it is not contemplated by that rule that such a notice should be issued in a case where execution has been taken out against a judgment-debtor as in this case where subsequently the judgment-debtor dies and then execution is sought to be taken out against the legal representatives. The argument therefore appears to be that in these circumstances the proper application to be made was in fact made, namely, an application for substitution. A case in the Madras High Court, *Ramanathan Chettiar v. Ramanathan Chettiar*, *A. I. R. 1929 Mad. 275*, is quoted in support of that argument. This matter, however, appears to have been finally decided in the case of *Raghunath Das v. Sundar Das Khatri* (1). In the first place I must state that the case just mentioned was

(1) *A. I. R. 1914 P. C. 129 = 24 I. C. 304 = 41 I. A. 251 = 42 Cal. 72.*

decided under the Code of 1882, S. 248 being similar to O. 21, R. 22 of the present Civil P. C. There is this difference. There is a difference in the arrangement of the sentences and in the present rule there is a proviso or sub-clause which gives the Court jurisdiction to omit the notice in cases where the issue of such notice would cause unreasonable delay or defeat the ends of justice. In dealing with the point which has been argued on this provision it must be said that it cannot be denied that this is not a case in which the Judge considered that unreasonable delay had occurred or that the ends of justice would be defeated which therefore excused the issue of such notice.

I have already pointed out in an earlier part of my observations that the parties and the Court appear to have been under the impression that they were carrying out the provisions of the Code by issuing a notice upon the legal representatives to show cause why they should not be substituted. It is therefore quite clear that this is not a case which comes under the sub-clause of O. 21, R. 22. Apart from that sub-clause I have already stated that the provisions of the rule are similar to those of S. 248. Now to go back to the case of *Raghunath Das v. Sundar Das Khetri* (1) Lord Parker of Waddington delivering the opinion of the Judicial Committee of the Privy Council stated that the omission of a notice under S. 248 resulted in the sale being void. In the case of the Madras High Court it was sought to differentiate the case to which I have just referred of the Judicial Committee of the Privy Council on two grounds : first, that the expression "legal representative" was not used by the learned Law Lord who delivered the decision of the Judicial Committee ; and secondly, that there was no explicit statement by him that the sale was void. Always assuming that the decision of the Madras High Court was correctly reported I would say with great respect that I do not agree with the observations to which I have just referred. First, so far as the fact that Lord Parker did not mention the expression "legal representative" is concerned the answer is that he was dealing with S. 248 which expressly used those words in sub-Cl. (b) and which he was applying to the facts of the case,

and secondly, so far as not stating that the sale was void he expressly came to the conclusion that a purchaser who had purchased property in an execution sale in which a notice under sub-Cl. (b) had been omitted had got no title from his purchase.

As regards the main question which has been argued on behalf of the respondents, namely, that O. 21, R. 22, applies only to those cases in which execution is taken out against the representative of the judgment-debtor in the first instance the answer is also contained in the case of *Raghunath Das v. Sundar Das Khetri* (1). That was a case in which execution was taken out against the judgment-debtor. He then became insolvent. An Official Receiver or assignee was appointed and the notice which was taken out by the decree-holder was the same kind of notice which was taken out in the case before us, namely, a notice to show cause why he should not be joined or substituted in place of the judgment-debtor. It was pointed out by the Judicial Committee that that notice was not correct. A form of notice was provided for by S. 248, that is to say, a notice to the party against whom execution is applied for requiring him to show cause, within a period to be fixed, why the decree should not be executed against him. The reasons why the section should be strictly applied were pointed out by Lord Parker and in any event the case, as I have already stated, definitely decides the two questions before us : first, that O. 21, R. 22, applies to a case of this kind, and secondly that if no notice has been issued as contemplated by O. 21, R. 22, sub-Cl. (b) then the sale was invalid.

Arriving at this conclusion, as I do the other two questions argued by the appellant do not arise, but I propose to express my view on the first. The question was whether the notice in fact was served. The learned Subordinate Judge relied upon the affidavit of the peon who purported to serve the notice. He said that he went to Bagdigi Colliery and on identification, the peon finding Mr. Sen the proper officer of the judgment-debtor present gave him the notice. The affidavit goes on to say that on the refusal of Mr. Sen to accept the notice and give a receipt it was affixed to the outer door of the judgment-debtor's office. The learned Subordinate Judge, in my

opinion, was entitled to rely upon this as prima facie evidence of service. It is said that there was no evidence that Mr. Sen was the proper officer but in the absence of evidence on the part of the judgment-debtor or his representative it was not for the decree-holder or the officer of the Court, whoever he might be, to set out in detail the reasons why he came to the conclusion that Mr. Sen was the proper officer of the judgment-debtor but there was no evidence on the part of the judgment-debtor. It was further argued that the address was not the proper address of the judgment-debtor, that the colliery was in the hands of a receiver and that in all probability Mr. Sen was the officer or manager of the receiver. I have already stated, and repeat, that no evidence at all was given in the Court below and the only documents relied upon in this Court are a petition of the receiver and a petition of the petitioner before us. In my opinion we cannot look to these to establish the fact that the property was in the hands of a receiver. For these reasons, if it were necessary to express an opinion, I should be satisfied that the proof which was given was sufficient to entitle the Court to proceed. In these circumstances the appeal must be allowed with costs and the sale must be set aside. The purchase-money paid and distributed amongst the creditors will be refunded to the decree-holder.

Fazl Ali, J.—It was held by the Judicial Committee in *Raghunath Das v. Sundar Das Khetri* (1), that a notice calling upon the official assignee to show cause why he should not be substituted for the insolvent judgment-debtor was not a proper notice under S. 248, Civil P. C. of 1882 (a provision to which O. 21, R. 22 of the present Code corresponds) and that the notice under that section should have called upon him to show cause why the decree should not be executed against him. In view of this decision, it is difficult to construe the notice dated 30th August 1928 issued by the Subordinate Judge as a notice under O. 21, R. 22. Assuming however, that it may be treated as such, I am not at all sure whether on the materials on the record it can be held that the notice was properly served. It is true that primarily it is for the judgment-debtor to prove that the notice was not served,

but it is open to the judgment-debtor to argue on the materials placed on the record on behalf of the decree-holder that there was no proper service of the notice. In this case all that we have before us is the report of the peon and an affidavit of the identifier who accompanied the peon to serve the notice. The peon says in his report that the notice was presented to one Mr. Sen : "an officer competent to accept the notice in the name of the defendants" but he refused to accept it and give a receipt and so the notice was affixed to the outer door of the office. The same facts are repeated in the affidavit of the identifier who describes Mr. Sen as "the proper officer of the judgment-debtors." One would have expected some clearer description as to who Mr. Sen is and what connexion he has with the heirs of the judgment-debtor to whom the notice was addressed and after all, the description given of this gentleman by the peon as well as by the identifier merely represents their opinion that he was a person competent to accept notice on behalf of the judgment-debtor but they do not show in what way he represented them. O. 5, R. 12 provides:

"Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient."

There is nothing on the record to show beyond the mere opinion of the peon and the identifier that Mr. Sen was empowered to accept service on behalf of the persons to whom the notice was issued. Again O. 5, R. 17, says that the notice may be affixed on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, if the defendant or his agent refuses to sign the acknowledgment. It cannot be said that the persons to whom the notice was addressed resided at the colliery where the notice was sent, because in the application filed by the decree-holder dated 30th August 1928 it is said that Mr. T. Smith resides at Khorassi Estate, Purnea, and Mrs. D. M. Smith resides at 10, Anwar Sha Road, Calcutta. It is also urged on behalf of the appellant and the statement is supported by several orders recorded in the order sheet of this case, that Bagdigi Colliery was in the possession of a recei-

ver appointed by the Court and so it is difficult to say that the persons who were being proceeded against were at the moment carrying on business or personally working for gain at this colliery. I am therefore inclined to think that there was neither a valid notice under O. 21, R. 22 in this case nor was the notice which was regarded as such by the learned Subordinate Judge properly served. In this view I agree that the appeal should be allowed with costs.

K.N./R.K.

Appeal allowed.

A. I. R. 1932 Patna 203

FAZL ALI, J.

Hukum Chand Sinha and others—Appellants.

v.

Jugal Kishwar Rai and others—Respondents.

Second Appeals Nos. 1017 to 1020 of 1930, Decided on 23rd November 1931, against decision of Dist. Judge, Shahabad, D/- 16th April 1930.

(a) **Bengal Tenancy Act (1885), Ss. 35 and 30 (b)—Suit under S. 30 (b)—Rent found to be already too high—Court can refuse enhancement altogether.**

The language of S. 35 is very wide, and if, in a suit under S. 30 (b) the Court finds that the rent is already too high, it can exercise its discretion to refuse to grant any enhancement altogether: *A. I. R. 1929 Pat. 348 and 702, Expl.* [P 204 C 1]

(b) **Bengal Tenancy Act (1885), Ss. 30 (b) and 27—Suit for enhancement—Burden of proving that rent is fair and equitable is not to be thrown on landlord.**

Section 27 merely determines the question of burden of proof and in cases for enhancement of rent, under S. 30 (b), a Court should not throw upon the landlord the onus of proving that the rent payable by the tenants for the time being is fair and equitable. [P 204 C 2]

B. P. Sinha—for Appellants.

Shiveshwar Dayal—for Respondents.

Judgment.—These appeals arise out of certain suits for enhancement of rent under S. 30 (b), Ben. Ten. Act. Both the Courts below have refused enhancement on the ground that the rents assessed on the lands are unduly high and hence these appeals by the plaintiff. It appears that in the year 1907 the plaintiffs had filed an application in a batwara proceeding in which they stated that the lands in the patti which had been allotted to them were of very inferior quality

that there were no facilities for irrigation and that it would be impossible for the landlords to realize rent from the tenants. Subsequently they claimed enhancement under S. 106, Ben. Ten. Act, with regard to some of the lands in their patti other than the lands involved in the present suits, but their claim was disallowed on the ground that the rents payable on the lands by the tenants were already too high. Both the petition filed by the plaintiffs and the judgment in the proceeding under S. 106, Ben. Ten. Act, have been admitted in evidence and have been referred to by the Courts below.

One of the points urged by Mr. Bhubaneswar Prasad Sinha who appears for the appellants is that although the fact that the rents are unduly high may be used as a ground for not allowing enhancement at the maximum rate, it will not justify the Court in refusing enhancement altogether. While pressing this argument the learned advocate discussed at length two decisions of this Court: *Nirmal Kumar v. Gauri Prasad* (1) and *Kamala Prasad v. Bankey Prasad* (2). In the former case it was held by a Division Bench of this Court of which I was a member that in a suit for enhancement of rent under S. 30 (b), Ben. Ten. Act, the fact that the lands in suit were of bad quality was immaterial. In the latter case which was decided by Das and James, JJ., it was held that under S. 35 of the Act it is necessary to show that the rent payable by the raiyat is already unduly high or that the productive capacity of the land has deteriorated through no fault of the raiyat since his rent was settled on the previous occasion; otherwise the tenant is liable to pay the enhancement which would be admissible under the rules laid down by S. 32. The Courts below have disallowed the claim for enhancement relying on the latter decision and the main contention of the learned advocate for the appellants is that not only has that decision been misunderstood by the Courts below but that they have not applied the principle laid down in the case of *Nirmal Kumar v. Gauri Prasad* (1). The learned advocate for the appellants concedes that enhancement may be refused altogether on the ground that there has been a serious deterioration in the productive power of

(1) *A. I. R. 1929 Pat. 348=121 I. C. 476.*

(2) *A. I. R. 1929 Pat. 702=124 I. C. 390.*

the land; but he contends that the claim for enhancement cannot be totally disallowed merely because it is found that the rents are unduly high.

It appears to me however that this would be unduly restricting the scope of S. 35, Ben. Ten. Act. The language used in S. 35 is very wide and if the Court can exercise its discretion under this section so as not to grant the maximum enhancement admissible, the Court has in my opinion also the discretion to refuse to grant any enhancement. As was pointed out by James, J., in *Kamla Prasad's* case (2), S. 30 (b), Ben. Ten. Act, is based on the legal and historical principle that the landlord is entitled to a certain share of the produce of the holding. Thus assuming that it is found in a particular case that the rent assessed on the land is already so high that it represents much more than the value of the normal produce or the share of the landlord in the produce of the holding or that the tenant finds it impossible to pay even the rent assessed upon it, I do not see why the Court cannot use its power under S. 35, Ben. Ten. Act to refuse to grant any enhancement. It is true that in *Nirmal Kumar's* case (1), this Court has held that the mere fact that the lands in suit are of bad quality will be no ground for refusing the enhancement; but it does not follow that the Court cannot under S. 35 take into consideration the fact that in a given case the rent is unduly high. The land may be of bad quality, but the rent may be equally low and in such cases the enhancement under S. 30 (b), Ben. Ten. Act, cannot be refused merely on the ground that the lands are of poor quality. Thus there does not appear to me to be any conflict, direct or indirect, between the two decisions to which I have referred. The question then is whether the finding of the Courts below that the rents are unduly high in the cases under appeal is one arrived at in accordance with law. Mr. Sinha contends that this finding is not such as should bind this Court, (1) because the Courts below have ignored the provisions of S. 27, Ben. Ten. Act under which it should be presumed that the rent for the time being payable by an occupancy raiyat is fair and equitable until the contrary is proved, and (2) because the Courts below have taken into consideration the judgment Ex. D which

Mr. Sinha contends was wholly inadmissible in evidence. Now S. 27 merely determines the question of burden of proof and all that we have to see in cases like the present is that the Court does not throw upon the landlord the onus of proving that the rent payable by the tenants for the time being is fair and equitable. In the present case although the Courts below have not expressly referred to S. 27, yet I am unable to hold that any of the Courts have misplaced onus on the plaintiff. Mr. Sinha relied mainly on a passage in the judgment of the lower appellate Court where after referring to some of the evidence in the case the learned District Judge says "there is nothing to show if rents are not very high." To my mind this passage does not show that the learned District Judge wanted the plaintiffs to establish at the very outset that the rents were fair and equitable and not very high. My reading of the judgment is that the learned Judge having found that the defendants had succeeded in establishing that the rents were unduly high was not in a position to find anything in the evidence of the plaintiff to show that the defendants' evidence on the point should not be accepted.

As to the judgment Ex. D, although as a rule judgments pronounced in other cases are inadmissible, yet I do not think that in the present case the learned District Judge has made any improper use of the judgment or that it was wholly inadmissible. I find also that the learned District Judge, although he has referred only to Exs. A and B in his judgment, has decided the case upon the entire evidence adduced by the parties and has not dealt specifically with the other pieces of evidence because he found himself in agreement with the decision of the trial Court in which the other evidence has been discussed.

In my opinion these appeals are concluded by findings of fact and this Court cannot interfere with the discretion exercised by the Courts below under S. 35, Ben. Ten. Act. The appeals are therefore dismissed with costs. There will be one set of hearing fee.

S.N./R.K.

Appeals dismissed.

* A. I. R. 1932 Patna 205

MACPHERSON AND SCROOPE, JJ.

Ramadhar Rai and others — Petitioners.

v.

Subedar Pathak—Opposite Party.

Civil Revn. No. 523 of 1930, Decided on 30th June 1931, against order of Munsif, Second Court, Buxar, D/- 2nd September 1930.

* Civil P. C. (1908), O. 23, R. 3—Pending suit—Reference to arbitration without intervention of Court—Award—Court can pass decree in terms of award under O. 23, R. 3.

Where in a pending suit parties have referred their differences to arbitration without an order of the Court and an award is made, a decree in the terms of an award can be passed by the Court under O. 23, R. 3 of the Code and not otherwise. Such an award constitutes an adjustment of the suit by the parties themselves, which should be given effect to under O. 23, R. 3; *A. I. R. 1927 Bom. 565 (F. B.)*; *A. I. R. 1928 Mad. 1025 (F. B.)* and *A. I. R. 1925 All. 503 (F. B.)*, *Rel. on.*; *A. I. R. 1921 Cal. 238*; *A. I. R. 1927 Cal. 887* and *A. I. R. 1921 Lah. 232*, *Diss. from*; *A. I. R. 1924 Pat. 488*, *Ref.*

[P 205 C 2]

B. P. Varma—for Petitioners.

Scroope, J.—This is an application under S. 115, Civil P. C., against the order of the Second Munsif of Buxar declining to act upon an award made by arbitrators in Civil Suit No. 23 of 1928 under a reference made to them under a registered ekrarnama without the intervention of a Court. There is a well-known conflict of opinion as to whether an award made without the intervention of a Court in a pending suit can be treated as an adjustment of a suit by agreement within the meaning of O. 23, R. 1, Civil P. C.

On the one hand there are Full Bench decisions of three High Courts, namely, Bombay, Madras and Allahabad, to the effect that where in a suit parties have referred their differences to arbitration without an order of the Court and an award is made, a decree in the terms of an award can be passed by the Court under O. 23, R. 3, Civil P. C., and not otherwise: *Chanbasappa v. Basalingayya* (1), *Subbaraju v. Venkatramaraju* (2) and *Gajendra Singh v. Durga Kunwar* (3). On the other hand, according to the

decisions of the Calcutta High Court, if an award is made in such circumstances the Court should not take any notice of the award and the suit may be proceeded with on the application of either party: see for instance, *Dekari Tea Co. Ltd. v. The India General Steam Navigation Co.* (4) and *Girimoni Dasi v. Tarini Charan* (5). The same view seems to have been taken in the Lahore High Court: vide *Hari Prasad v. Soogni* (6). The question has been discussed at very great length in all of these decisions and it is practically impossible to say anything new on the subject except that the position urgently requires legislation. In this High Court we have no decision bearing directly on the point but in *Kokil Singh v. Ramasray Pd.* (7), Ross, J., observed as follows:

"In all the cases cited there was a suit pending at the time the award was made and the question was how the award was to be dealt with in the suit. The better opinion seems to be that it can be dealt with as a bar to the further continuance of the suit."

That being the opinion so far expressed by this Court, on the principle of stare decisis I would follow it, supported as it is by the Full Bench decisions of the three High Courts referred to above, and would hold that the registered ekrarnama and the award constituted an adjustment of the suit by the parties themselves which should be given effect to under O. 23, R. 3. It may be noted that the subject-matter of the suit in question was not the only matter referred to arbitration but a number of other matters foreign to the suit were also referred and this seems to me an additional reason for following the Full Bench decisions I have referred to; otherwise we get the position that part of the award is enforceable in Court and part of it is not.

Another reason for which the Munsif declined to take any action on the award was that the defendants did not challenge order No. 31, dated 24th February 1930, which was to the following effect: "Defendant does not appear. Heard plaintiff's pleader. It appears that the award was made by the arbitrators under a reference made to them by a registered ekrarnama; the award cannot be acted upon in this suit as the reference,

(1) *A. I. R. 1927 Bom. 565=105 I. C. 516=51 Bom. 908 (F. B.)*.

(2) *A. I. R. 1928 Mad. 1025=113 I. C. 632=51 Mad. 800 (F. B.)*.

(3) *A. I. R. 1925 All. 503=88 I. C. 768=47 All. 637 (F. B.)*.

(4) *A. I. R. 1921 Cal. 238=61 I. C. 919*.

(5) *A. I. R. 1927 Cal. 887=104 I. C. 360=55 Cal. 538*.

(6) *A. I. R. 1921 Lah. 232=67 I. C. 123*.

(7) *A. I. R. 1924 Pat. 488=81 I. C. 994=3 Pat. 443*.

if any, was without the intervention of the Court."

Now the facts are that the suit was instituted on 2nd March 1928, and was stayed on 13th June 1928, as it was a partition suit brought by an auction-purchaser in execution of a mortgage decree and an appeal was pending in the High Court as regards the extent of the interest so acquired by the plaintiff. It was again taken up on 29th January 1929, but was stayed by the orders of the High Court. In the meantime, that is, on 10th February 1930, the award and the ekrarnama were put in by some persons unknown and, as I say, on the objection of the plaintiff the above order was passed on 24th February 1930. Though the plaintiff had been directed on 14th February to make over a copy of his objection to the award to the other side, it does not appear that it was ever done and it was not until 1st September 1930, that the defendant appeared and asked that the case be decided under O. 23, R. 3. It was not then disputed that there had been a genuine award. It was incumbent on the plaintiff to show, having regard to the order of 14th February referred to above, that the defendants had notice that the award was being taken into consideration on 24th February 1930. But this has not been done, so I do not think any stress can be laid on the failure of the defendants to appeal against the order of 24th February 1930.

For these reasons I would set aside the order in question and direct that the award be disposed of under the terms of O. 23, R. 3, Civil P. C., and the petitioners be entitled to their costs. Hearing fee two gold mohurs.

Macpherson, J.—I agree.

B.V./R.K.

Order accordingly.

A. I. R. 1932 Patna 206

KULWANT SAHAY AND JAMES, JJ.

Benares Bank, Ltd., Bhagalpur—Plaintiff—Appellant.

v.

Krishna Das and others—Defendants—Respondents.

First Appeals Nos. 179 of 1928 and 87 of 1929, Decided on 16th February 1932, against decision of Sub-Judge, Bhagalpur, D/- 31st March 1928.

Hindu Law—Joint family — Partnership—Liability of sons for debts incurred by father for partnership business—Principles stated.

When the members of a joint Hindu family trade together as partners of a firm, they are all personally liable for the debts of that firm. Persons who are found by their conduct to have constituted themselves partners in a family business would be personally liable. A minor member of a joint family trading partnership is not personally liable for the debts of the partnership if on attaining majority he dissociates himself from the business of the family, but if on attaining majority he expressly ratifies the contracts of the firm, or if he proceeds to take an active part in its business, then he is personally liable as a partner for the debts of the firm. A man when he becomes an active member of the trading partnership must be presumed to take it as it stands, that is to say, he becomes liable for the debts of the firm and entitled to his share in the assets, and he cannot repudiate the liabilities while carrying on the business as a going concern. The mere fact that the sons sit in the shop does not justify a finding that they have definitely accepted their position as partners in the firm; but where the evidence goes further than that, and is to the effect that the sons do the work of the shops they may be said to have definitely accepted the position of partners in that firm. When a person does the work of the shop for a firm which actually bears his name as one of the partners it must be held that he has definitely accepted his position as a partner in the joint family business : *A. I. R. 1929 Mad. 573* ; *22 Mad. 166* and *A. I. R. 1931 Pat. 328, Ref.* [P 207 C 1, 2]

Shiveshwar Dayal and Kameshwar Dayal—for Appellants.

Jafar Imam, S. C. Mazumdar and K. P. Sukul—for Respondents.

James, J.—These two appeals arise out of two suits instituted by the Bhagalpur branch of the Bank of Benares, the first for the value of certain hundis drawn by the firm of Gobardhan Das Krishna Das on Gobaradhan Lal which were duly cashed by the bank but dishonoured on the due dates; and the second for the amount due from the firm on an overdrawn current account. Gobaradhan Lal, who had guaranteed the overdrafts, was joined as a defendant in both the suits, while the other defendants were Gobardhan Das and his sons. Gobaradhan Lal attempted to deny his liability for the overdrafts, but on this point the Subordinate Judge decided in favour of the plaintiffs and we are no longer concerned with the question of his liability. The plaintiffs alleged that the firm of Gobardhan Das Krishna Das, with which they dealt consisted of Gobardhan Das and his sons and they prayed for a decree against the whole family. The learned

Subordinate Judge found that the business of the firm was a family business in which the son Krishna Das had taken active part when he came of age, and that a new firm established later under the name of Krishna Das Raghunath Das, two of the sons of Gobardhan Das, was merely a branch of the original firm and was also a family trading concern. But when he came to discuss the question of whether the sons of Gobardhan Das were also liable for the debts, he did not consider it as a question of the liability of partners in a trading firm, but merely as that of the liability of members of a joint family whose managing member had incurred debts on their behalf. He solved the difficulty by pointing out that it was the pious duty of the sons to pay debts incurred by their father, and he therefore pronounced judgment against all the defendants; but he observed that the sons were liable not personally but only to the extent of their undivided interest in the co-parcenary property. The bank appeals from that decision, claiming that the sons should be held personally liable.

Mr. Shiveshwar Dayal on behalf of the appellants argues in the first place that those sons of Gobardhan Das, who were of age at the date of the institution of the suit, ought to have been held liable, not merely as members of a joint family benefited by the loan or as sons under the pious duty of meeting their father's debts, but as partners in the firm, responsible for its liabilities, and so to be treated as the actual borrowers of the money. He points out that the learned Subordinate Judge has found that the business is a family business and that after Krishna Das came of age he took part in that business, and he argues that on that finding Krishna Das ought to have been held personally liable for the debts of the firm. He relies upon the principle laid down in the case of *Somasundaram Chettiar v. Kannoo Chettiar* (1) wherein it was pointed out that when the members of a joint Hindu family trade together as partners of a firm, they are all personally liable for the debts of that firm. Mr. Jafar Imam, on behalf of the respondents, argues that the plaintiffs are not entitled to a personal decree against any member of the family except

the managing member, relying on the decision in *Chalamayya v. Varadayya* (2), but the learned Judges in that case definitely pointed out that persons who are found by their conduct to have constituted themselves partners in a family business would be personally liable. In the case of *Jwala Prasad v. Budha Ram* (3), which is also cited by Mr. Jafar Imam, a minor member of a Hindu family having a joint family business was held not to be personally liable, but it was there expressly pointed out that the minor was exempted from personal liability because he was not of age when the suit was instituted and there was nothing to show that he had ratified the contract on attaining majority. A minor member of a joint family trading partnership is not personally liable for the debts of the partnership if on attaining majority he dissociates himself from the business of the family, but if on attaining majority he expressly ratifies the contracts of the firm or if he proceeds to take an active part in its business, then he is personally liable as a partner for the debts of the firm. Mr. Shiveshwar Dayal argues reasonably that a man when he becomes an active member of the trading partnership must be presumed to take it as it stands, that is to say, he becomes liable for the debts of the firm and entitled to his share in the assets, and he cannot repudiate the liabilities while carrying on the business as a going concern. The question here is principally one of fact, of whether those members of the family who were sui juris at the time of the institution of the suit had by taking an active part in the business rendered themselves liable for its debts.

Only three of the sons, Krishna Das, Baldeo Das and Raghunath Das were of age at the time of the institution of the suit. The rest of the sons of Gobardhan Das were minors up to the date of the decree and, so far as we know, they are minors still. It matters little for the purposes of this appeal whether they have come of age or not, because in the circumstances there is necessarily nothing on the record to indicate whether they have proceeded to take an active part in the partnership or whether

(2) [1899] 22 Mad. 166=9 M. L. J. 3.

(3) A. I. R. 1931 Pat. 328=134 I. C. 420=10 Pat. 503.

(1) A. I. R. 1929 Mad. 573=118 I. C. 494.

they have otherwise ratified the contracts. We are concerned here therefore only with Krishna Das, Baldeo Das and Raghunath Das.

The learned Subordinate Judge has found that when Krishna Das came of age he began to take part in the business of this firm, and he definitely does not believe the story of Krishna Das that when he transacted business on behalf of the firm with the Benares Bank, he was acting merely as a messenger. The new firm which the learned Subordinate Judge finds to have been a branch of the original firm and equally a family trading partnership bears the name of Krishna Das Raghunath Das.

It is proved by the evidence of Jugal Kishore Lal, a mukhtar of Bhagalpur, that in 1923 Krishna Das himself wrote an account of this firm to be inserted in Thacker's Directory wherein he described Gobardhan Das as one of the partners and himself Krishna Das as the managing proprietor. Moreover Krishna Das, who was then of age, himself cashed several of the cheques which form the subject-matter of one of the suits. Gobardhan Das and Krishna Das endeavoured to make out that Krishna Das or the other sons had no concern with the firm of Gobardhan Das Krishna Das, that all the family was maintained by the maternal grandmother of Krishna Das and that Krishna Das himself traded separately from his father. A relation of the family named Manik Lal gave evidence to the same effect and another shop keeper said that he never saw Krishna Das doing any work in the shop of Gobardhan Das Krishna Das. But the learned Subordinate Judge did not believe this evidence, and it is clear that Krishna Das at least was an active partner in the firm. Badri Lal, who is of the same caste as the defendants, says that all the members of the family are jointly interested in the shops, which he infers from the fact that he has seen them all sitting and working in them, and Muni Lal, another Agarwala, gives evidence to the same effect. Mr. Jafar Imam on behalf of the respondents suggests that the mere fact that the sons sit in the shop does not justify a finding that they have definitely accepted their position as partners in the firm; but the evidence goes further than that, and is to the effect

that the sons do the work of the shops. Of Raghunath Das in particular, it must be held that when he does the work of the shop for a firm which actually bears his name as one of the partners, he has definitely accepted his position as a partner in the joint family business, and indeed the same inference may fairly be drawn with regard to Baldeo Das, who must be held to have also accepted his position as partner in the family business when he continued to do the work of it after coming of age. I would therefore modify the decision of the learned Subordinate Judge to this extent: that Krishna Das, Baldeo Das and Raghunath Das should be held personally liable under the decree.

Mr. Shiveshwar Dayal points out that the learned Subordinate Judge when pronouncing judgment omitted to award interest to the plaintiffs from the date of the institution of the suits. In Suit No. 41 of 1927, which was concerned with the overdrafts, this was subsequently corrected. In Suit No. 70 of 1926, the learned Subordinate Judge found himself unable to amend his decree because an appeal had been preferred, although he remarked that it was by oversight that he had omitted to allow interest, and that there were no circumstances justifying its not being allowed. The decree in Suit No. 70 of 1926 (F. A. 179 of 1928) may be further amended by the allowing of simple interest at 6 per cent per annum from 13th March 1926 to the date of realization, together with interest at the same rate on the costs from the date of the decree.

To this extent the appeals will be allowed with costs.

Kulwant Sahay, J.—I agree.

K.N./R.K.

Appeals allowed.

* A. I. R. 1932 Patna 209

COURTNEY-TERRELL, C. J. AND
ROWLAND, J.*Hikayat Singh*—Appellant.

v.

Emperor—Opposite Party.

Reference No. 40 of 1931 and Criminal Appeal No. 4 of 1932, Decided on 27th January 1932, against order of Sess. Judge., Saran, D/- 21st December 1931.

* (a) Criminal P. C. (1898), S. 496—Bail should not generally be granted in cases of crimes punishable with long terms of imprisonment and never in case of murder.

Save in exceptional cases, persons accused of crimes punishable with long terms of imprisonment should not be released by Magistrates and Sessions Judges on bail. The richer the accused and the more easy it is for him to find bail, the less it is desirable that he should be released, and in no circumstances whatever without an order of the High Court should any person accused of murder be allowed bail. In England a person charged with murder is never in any circumstances released on bail and the opportunities in India for the corruption of witnesses are so great that the risks involved cannot be exaggerated. [P 211 C 1]

(b) Penal Code (1860), S. 302—Brutal and premeditated assassination—Sentence of death is proper.

In a case of a brutal, premeditated and concerted assassination a sentence of death is proper. [P 212 C 2]

K. N. Chaudhuri and *D. L. Nandkeol-
yar*—for Appellant.

Govt. Advocate and *A. C. S. Sinha*—for the Crown.

Courtney-Terrell, C. J.—The six appellants were convicted and sentenced to death by the Sessions Judge of Saran for the murder on 3rd September 1931 of one Mahadeo Teli at village Amnour, thana Mirzapur. Together with them was tried one Raghunath Singh who was acquitted. Two persons were clearly concerned with the appellants in the crime, namely, Kripali Singh, son of Raghunath Singh, and one Chait Raut, absconded, and have not been brought to trial. The two first-named appellants are Rajputs. Chathu Sah and Punit Sah are Telis. Sheolagan Ahir is a Goala and Chirkut Sah is a Kandui. The murdered man, Mahadeo Teli, and his three sons, Debi, Durga and Sheopujan, belong to the Teli caste and they have borne consistently a bad character. Debi and Sheopujan were wounded in the course of the same occurrence. The neighbourhood is one in which crimes of violence are prevalent.

The attack upon Mahadeo Teli and his

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sons which resulted in the death of Mahadeo occurred in the following manner. Some few months before Debi had instituted a criminal case under S. 324, I. P. C., against Raghunath Singh, Kripali Singh and the appellants Sukhdeo Singh, Chathu Sah and Punit Sah and several others including one Kishun Kurmi. Kishun Kurmi had instituted a counter-case against Mahadeo and his three sons. The cases were pending in the Court of the Magistrate of Chapra. One Sarjug Nonia of the village was a witness for Debi Teli. Raghunath Singh, Sukhdeo Singh and others had asked Sarjug not to depose for Debi Teli and threatened him with serious consequences if he disobeyed their orders. Sarjug however appeared as a witness for Debi Teli before the Magistrate on 28th August. The persons accused by Debi Teli were highly irritated by this and threatened Sarjug that he would be killed. Sarjug filed an application mentioning this fact to the Magistrate. It also appears that the witnesses for Kishun Kurmi were Raghunath Singh and the appellants Hikayat Singh, Punit Sah and Chirkut Sah.

The circumstances of the murder of Mahadeo Teli have been proved up to the hilt and are correctly narrated in the clear and careful judgment of the Sessions Judge. They may be summarized as follows: On 3rd September 1931, shortly before sunset, Sarjug Nonia came to the shop of Mahadeo and complained to him and his sons Debi and Durga that he had been assaulted by the appellants Chathu Sah and Punit Sah. Mahadeo and Debi left the shop with Sarjug and went to the bhathi of Hoti Lal Sah not far from their house to gain his support. Hoti Lal Sah was not at home so, at the request of Sarjug, Mahadeo and Debi accompanied him towards his house walking up the main street of the village towards the north. When they came to the turning to the west which leads to Sarjug's house they found the appellants together with Raghunath Singh his son Kripali Singh and Chait Raut waiting at the corner. Raghunath, Sukhdeo, Chait and Sheolagan were armed with pharsas, Kripali, Hikayat, Chathu and Punit with bhalas and Chirkut with a lathi. The Sessions Judge has given Raghunath the benefit of the doubt and is not satisfied that he was in fact there. The learned Judge was in-

clined to believe that Raghunath Singh had been roped in by the sons of Mahadeo as the real leader of the party. He based his opinion on certain evidence offered by the prosecution directed to the conduct of Raghunath after the occurrence. This evidence he disbelieved. The learned Judge heard the evidence and was in a better position than we are to weigh it. Suffice it to say that he has acquitted Raghunath Singh. The armed party immediately made a violent attack upon Mahadeo. Kripali ran his spear into the abdomen of Mahadeo and the other persons simultaneously fell upon him with their weapons. As a matter of fact his body bore numerous wounds consistent with the use by his assailants of bhalas, pharsas, and lathis. He died immediately. Debi Teli was wounded in the groin by Punit Sah with a bhala and fled away and concealed himself in an unoccupied shop close by. The cries of the victims brought on the scene the two other sons of Mahadeo, Sheopujan and Durga. They also saw the assault upon their father and brother and Sheopujan was wounded by Hikayat Singh on the back of the left thigh with a bhala and was also hit by Chirkut with a lathi.

The assault was committed at a time when shops were open and the people of the village were about their evening business. There is not the slightest doubt that it was witnessed by a great number of people but there has been a conspiracy of silence and with one exception no eye-witness has come forward. When the Sub-Inspector visited the village and interviewed the persons mentioned in the first information as witnesses, every one with the exception of the single witness professed to know nothing about the matter. It is quite evident that the sympathies of the village are with the assailants and that the inhabitants are glad to be rid of the deceased. The three brothers carried the dead body southwards down the street till they came to the neighbourhood of the bhathi from which they had originally set out. They put the dead body down upon the road and Durga went further south to find the daffadar Kapurchand Mahto. He found the daffadar at his house and told him of the occurrence and mentioned the names of all the assailants. The daffadar directed him to go and call Charitar Ahir, chaukidar, and the daffadar himself came

to the place where the dead body was lying. The three brothers tried to get assistance to carry the body but all the villagers refused their assistance. Durga went to his own house and brought a khatia and the brothers placed the corpse upon it and carried it towards the house of the daffadar. Considerable time was spent in trying to get assistance and then one of the brothers brought their own bullock cart and the three brothers together with Charitar Ahir, chaukidar and another daffadar named Radhan Koeri set out for the thana at Mirzapore. The distance is some ten miles. On the way they came to the hospital at Marhowra and there they sought the assistance of the Assistant Surgeon who bandaged the injuries on Debi and Sheopujan. After this they continued their journey and arrived at the thana at 1-30 in the morning.

An attempt had been made by the learned advocate for the appellants to show that there was unnecessary delay in setting out from Amnour but we agree with the Sessions Judge that, having regard to the difficulty in carrying the body and the time occupied in seeking for assistance and the necessarily slow nature of the journey by bullock cart, the time has been quite satisfactorily accounted for.

In the first information which was lodged by Debi Teli he narrated that part of the incident which concerns Sarjug Nonia and dealt in detail with the attack on his father. He mentions as the attackers all the appellants together with Raghunath Singh who was acquitted and Kripali Singh and Chait Raut who are absconding and mentions no other persons. He specifies the weapons carried by each and then mentions a number of persons who came up on the alarm and states that the village is against him and that he cannot say if the persons whom he had named would give evidence or would be afraid to do so. Amongst the persons named is one Jamuna Singh who has in fact given evidence and has confirmed in the minutest detail the story told by the three brothers. The injuries inflicted on Debi and Sheopujan were also described together with the names of those persons who had inflicted them.

The Sub-Inspector went to the scene of occurrence arriving at 9-30 on the

morning of the 4th. Durga Teli pointed out to him the place on the road in front of the house of one Phagu Sonar where the attack had taken place. He found that an attempt had been made to scrape up the blood which had been shed there and indications that an attempt had been made to conceal the bloodstains by scattering ashes. He found however unmistakeable human bloodstains. Sarjug Nonia could not be found; nor could the accused persons. Processes were issued against them under Ss. 87 and 88, Criminal P. C., and they surrendered before the Magistrate some on the 14th September and some on the 23rd. As I have said, Kripali Singh and Chait Raut are still absconding. On the 14th September also Sarjug Nonia turned up and was examined by the Sub-Inspector but after that he again disappeared and has not again been seen.

The Magistrate took an extraordinary course. The accused persons, when they appeared before him were at once released on bail and this fact, together with the unpopularity of the deceased and his sons amply account for the refusal of the villagers to come forward and describe what they must undoubtedly have seen. We must point out in the most emphatic way for the future guidance of Magistrates and Sessions Judges that save in exceptional cases, persons accused of crimes punishable with long terms of imprisonment should not be released by them on bail. The richer the accused and the more easy it is for him to find bail, the less it is desirable that he should be released, and in no circumstances whatever, without an order of the High Court, should any persons accused of murder be allowed bail. In England a person charged with murder is never in any circumstances released on bail and the opportunities in India for the corruption of witnesses are so great that the risks involved cannot be exaggerated.

The three brothers have given evidence and one of the persons mentioned by Debi in his first information, Jamuna Singh, has confirmed their evidence. He is, as is to be expected, a partisan witness being the brother of Kishun Kurmi who was the complainant in the counter-case before mentioned, but his evidence has nonetheless been shown to be completely reliable. He states that he was a friend of Phagu Sonar outside

whose shop the occurrence took place. He arrived on the scene four or five minutes before the occurrence and his account of it corresponds exactly with that of the three brothers. He describes how Sarjug Nonia took to his heels immediately and how the neighbours kept away from the vicinity after the occurrence. The daffadar who was called by Durga has also confirmed the evidence of the brothers that the names of the accused were mentioned at the earliest possible moment. The movements of the daffadar have been confirmed by the evidence of the chaukidars.

It is difficult to find any trace of a defence by the appellants or any one of them. There was a suggestion made in the written statement that the deceased man had been killed and his sons wounded in a fight between them on the one side and some Koeris on the other in a gachi in the Koeri tola, but not a vestige of evidence was offered in support of this statement nor was the cross-examination directed to this issue nor was anything elucidated to support it. We agree with the learned Sessions Judge that it is ridiculous. Mr. Chaudhuri, on behalf of the appellants, attempted to urge it but could find nothing in the evidence to justify it. In fact the appellants have no defence whatever and Mr. Chaudhuri has been constrained to contend that the three sons were of such bad character that their story is unworthy of belief. Against this, as Sir Sultan Ahmad pointed out, the story of the assault and the identification of the accused and the part played by each of them was told at the earliest possible moment and has been consistent throughout and it is quite impossible that these three men should accuse persons other than the real assailants of having caused the death of their father and the wounds on themselves.

In this connexion Mr. Chaudhuri very properly drew our attention to the absence from the witness box of Sarjug Nonia, of Jagarnath Singh referred to in evidence and of several persons named in the first information report as eyewitnesses. The explanation given by the prosecution is that the witnesses are afraid to give evidence on account of being intimidated by the accused. We have noticed how Sarjug appeared on the 14th, the day that the accused surrendered, and was not seen again after their

release on bail, and we may refer to Ex. 4, a petition filed by Jamuna and Jagarnath on 1st October 1931, alleging that their lives were threatened by the accused if they did not obey the latter and abstain from giving evidence. Jamuna Singh has deposed that he was so threatened by Raghunath, Hikayat and Punit. We are satisfied that the failure to obtain the evidence of more eyewitnesses is adequately explained.

The only doubt in the whole case is as to the sufficiency of the reasons given by the learned Sessions Judge for acquitting Raghunath Singh, but with the correctness of that decision we are not concerned. As I have said, the learned Judge was in the best position to estimate the weight of the evidence, and we are not inclined to dissent from his view of the matter.

One of the assessors was of opinion that all the accused were guilty and that the case admitted of no doubt. The other three assessors from whom the Sessions Judge dissented express the opinion that the marpit occurred at some other place and found all the accused not guilty. This opinion is indefensible.

This is a case of a brutal, premeditated and concerted assassination, and in such circumstances the Sessions Judge rightly passed a sentence of death and that sentence we must confirm. The appeal must be dismissed.

It would appear from the evidence that the leaders of the attack were the Rajput accused, and it is probable that the Goala and Kandu appellants may have been under their domination; but it is difficult to find anything to differentiate their respective cases. If anyone took a leading part it would seem to be Raghunath Singh who was in fact acquitted. It is established beyond doubt that the deceased and his sons were persons of extremely bad character and a nuisance to the neighbourhood. It is not surprising that the villagers have effectively expressed their complete sympathy with the accused. Matters of this kind are however for the consideration of those in whom the prerogative of mercy is vested. The sentences are confirmed and the appeal is dismissed.

Rowland, J.—I agree.

B.V./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 212

WORT AND SCROOPE, JJ.

Sahdeo Singh and another—Petitioners.

v.

Ram Kishun Singh and another—Opposite Parties.

Criminal Revn. No. 512 of 1930, Decided on 31st October 1930, against order of Sess. Judge. Patna, D/- 29th August 1930.

Criminal P. C. (1898), S. 386 (b)—Property seized under S. 386 (a)—Petitioners claiming property to be joint—Proper procedure is to proceed under sub-Cl. (b).

Where petitioners claim that the property seized under S. 386 (a) is joint property, and there is some dispute as to whether the property is separate or joint property of the petitioners and of the defaulter in the S. 145 proceedings, the Court should proceed not under sub-Cl. (a), but under sub-Cl. (b) under which a warrant having been issued by the Collector of the district, the civil Court will proceed to hear and determine the question which arises in the matter. [P 213 C 2]

Baldeo Sahai—for Petitioners.

Janak Kishore and K. Dayal—for Opposite Parties.

Wort, J.—This Rule is directed against the learned order of the Magistrate dated 6th August 1930, the substance of which is to order certain property for sale in execution of costs which had been ordered to be paid by the first party in proceedings under S. 145, Criminal P. C. The petitioners are persons who are making a claim to the property which has been seized under S. 386, sub-Cl. (a), Criminal P. C. The argument which is addressed to us is this: that having regard to the fact that the petitioners and probably the second party to the S. 145 proceedings are claiming this property as a joint property the appropriate procedure is not sub-Cl. (a) but sub-Cl. (b) and I should add that at this stage the petitioners before us, as I understand the argument, are either asking now or will ask in future that in the property the first party to the S. 145 proceedings had no claim whatsoever. But that is a question which we do not decide.

On 6th August the petitioners, it appears, having made a claim to the property a police report was received by the Magistrate, and he states that Madan Singh had not discharged the onus which was upon him to show that the property was separate. There seems to be some misconception in the mind of the learned

Magistrate on this point, because the contention that was being made by the petitioners was that it was the joint property as I have already said and that Madan the first party to the S. 145 proceedings, had no claim at all. Now the matter comes before us after having been before a learned Judge of this Court who came to the conclusion, it would appear, that there was a difference of opinion between the Bombay High Court and the Calcutta High Court as to the meaning of the words "property belonging to the offender" in Cl. (a) and "property of the defaulter" in Cl. (b), that is to say, that the Calcutta High Court on the one hand has decided in the case of the *Queen-Empress v. Sita Nath Mitra* (1) that the meaning of the words to which I have just made reference was that only the property which was the separate property of the offender or defaulter could be executed upon in the manner provided in S. 386. The Bombay High Court in the case of *Shivalingappa Nijappa v. Gurlingava* (2) came to a different conclusion. However it does not become necessary for this Court to determine that question because the learned advocate, who appears on behalf of the petitioners, concedes that if it be shown that Madan, the first party to the S. 145 proceedings against whom costs were awarded had a share in this property, then that portion of the property can be attached and sold in execution of these costs. That is admitted and on the other hand the learned advocate who appears on behalf of the respondents before us, is not concerned in disputing that admission. In those circumstances it becomes unnecessary to decide whether the view which this Court takes is that which has been taken by the Calcutta High Court or which the Bombay High Court took of this matter is correct. If we came to analyse this in any event it seems to me that the Calcutta case might be differentiated on grounds to which I need make no reference.

That being the case the question arises is whether the argument on behalf of the petitioners can prevail. I have already indicated, there appears to be some confusion in the mind of the

Magistrate as regards the onus on the question of jointness or otherwise of this property but it is abundantly clear that there is some dispute at any rate between the petitioners on the one hand and the first party to the S. 145 proceedings on the other hand as to whether this is a separate property of the petitioners or whether it is a joint property of the petitioners and of the defaulter in the S. 145 proceedings.

Now it seems to me that in those circumstances the better method to have adopted would have been to have proceeded under sub-Cl. (b) under which a warrant having been issued by the Collector of the district the civil Court will proceed to hear and determine the question which arises in the matter and for those reasons without saying anything further in my judgment the order should be set aside and the learned Magistrate should proceed under S. 386, Cl. (b), Criminal P. C. The Rule is made absolute.

Scroope, J.—I agree.

S.N./R.K.

Order set aside.

A. . R. 1932 Patna 213

WORT, J.

Gudri Chaudhry—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 394 of 1931, Decided on 3rd November 1931, against order of Sess. Judge, Darbhanga, D/- 16th June 1931.

Criminal P. C. (1898), S. 108—"Disseminates or attempts to disseminate" explained.

The legislature has used the words "disseminates or attempts to disseminate" as not referring to the number of acts performed but rather having reference to whether the evidence showed that there was something to indicate that a repetition of the offence was probable; *A. I. R. 1928 All. 344, Diss. from.* [P 214 C 1]

K. N. Lal—for Petitioner.

Judgment.—The petitioner who has been bound over under S. 108, Criminal P. C., to execute a bond for Rs. 500 with two sureties of Rs. 200 each to be of good behaviour for one year is stated to have sung on a certain occasion the date of which is immaterial a seditious song. The fact that it was seditious is not contested by the learned advocate who appears on his behalf before me. The main contention before me is that the words in S. 108 "disseminates or attempts to disseminate" are such as to indicate

(1) [1892] 2 Cal. 478.

(2) A. I. R. 1926 Bom. 103=94 I. C. 604=27 Cr. L. J. 652=49 Bom. 906.

that the case does not come under the purview of that section unless there is something in the evidence to show that the act complained of is a habit on the part of the person who is bound over, and reference is made in that behalf to the case of *Emperor v. Chiranji Lal* (1). The learned Judge who decided that case seems to consider that had it been sufficient in the mind of the legislature that one such act would come within the mischief of the section the words which would have been used would have been "has disseminated or attempted to disseminate" and not "disseminates or attempts to disseminate." With great respect I do not agree with the learned Judge for the simple reason that the argument which is used in the course of his judgment is one which is equally in favour of the accused as it is in favour of the prosecution.

If the words "has disseminated or attempted to disseminate" had been used it would be difficult to meet the argument that the group of sections of which S. 108 is one were intended to avoid the mischief of something in the nature of a habit and how could it be said that a person who had performed a single act was in the habit of performing that act. It is quite clear in my judgment that the legislature has used the words "disseminates or attempts to disseminate" as not referring to the number of acts performed but rather having reference to whether the evidence showed that there was something to show that a repetition of the offence was probable. This of course depends on the facts of each case. In this case however the petitioner has stated and it does not seem to be denied, that he was unaware that this song had been proscribed and he was willing to give an undertaking at the appellate stage of the case. The learned advocate who appears on his behalf now undertakes not to repeat the offence and in those circumstances and on those conditions the order which has been passed against him under S. 103, Criminal P.C., will be set aside.

B.R./R.K.

Revision allowed.

(1) A. I. R. 1928 All. 344=114 I. C. 48=50 All. 854.

A. I. R. 1932-Patna 214

ROWLAND, J.

Chotu Hajjam and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 53 of 1932, Decided on 22nd February 1932, against order of Sess. Judge, Purulia, D/- 20th January 1932.

Criminal P. C. (1898), S. 59—Amendment of S. 59 makes it impossible to raise the argument that choukidar not being police officer has no power to receive custody of person arrested under S. 59 by private individual and to take him to police station.

The amendment of S. 59 passed in 1923 by inserting the words "or cause him to be taken in custody" has made it impossible to raise the somewhat technical argument that a chaulkidar not being a police officer has no power to receive the custody of a person arrested under S. 59 by a private individual and to take such person to the police station. This is specially so in Chota Nagpur where special powers are given and duties imposed on chaulkidars by the Chota Nagpur Rural Police Act, Ss. 21 (1) (6) and 22.

[P 214 C 2; P 215 C 1]

Murari Prasad and K. P. Upadhyaya—for Petitioners.

S. A. Manzar for *Asst. Govt. Advocate*—for the Crown.

Judgment.—The petitioners have been convicted under Ss. 147 and 225, I. P. C., the occurrence being the rescue from the custody of a chaulkidar of a man who was being escorted to the police station on a charge of theft. A Rule was issued on the ground that the rescue from the custody of the chaulkidar was not illegal within the meaning of S. 225, I. P. C., the point, that is to say, is whether the chaulkidar's custody was lawful custody. S. 59, Criminal P. C., authorizes any private person to arrest any person who in his view commits a non-bailable and cognizable offence and to take such person or cause him to be taken in custody to the nearest police station. It is to be seen whether the offence of theft was committed in the view of the person who arrested the alleged thief and whether such person after arresting the thief made him over to the chaulkidar. Before the amendment of the Code in 1923 it had been held in some cases that a chaulkidar not being a police officer had no power to receive the custody of a person arrested under S. 59 by a private individual and to take such person to the police station. But the

amendment in 1923 by inserting the words "or cause him to be taken in custody" has made it impossible to raise this somewhat technical argument now. Moreover the district in which the alleged occurrence took place is Chota Nagpur where special powers are given and duties imposed on chaukidars by the Chota Nagpur Rural Police Act, 1914 (Bihar and Orissa Act 1 of 1914), Ss. 21 (1) (6) and 22.

Coming to the evidence I find that it is clearly stated by P. W. 3 Mora Manjhi that he saw two Mahomedans catching a fowl belonging to Anpa and with the assistance of Gora Manjhi caught one of the thieves. Anpa (P.W. 2) corroborates this. It also appears in evidence that Mora among others was with the chaukidar at the time of the rescue. The Magistrate and the Sessions Judge accepted the evidence, and I think they were fully justified in doing so. There was no defect in the legality of the arrest or of the custody, and there is no defect in the conviction. The Rule is discharged.

S.N./R.K.

Rule discharged.

A. I. R. 1932 Patna 215

COURTNEY-TERRELL, C. J. AND
ROWLAND, J.

Ghyasuddin Ahmad and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 255 of 1931, Decided on 15th February 1932, against decision of Sess. Judge, Purnea, D/- 28th September 1931.

(a) Criminal Trial—Prosecution proving not all but some facts—Court must see that facts proved amount to offence charged.

If the prosecution has not proved all the facts which it was proposed to prove but has proved some of those facts what the Court has to see is whether those facts which have been proved amount to the offence charged and whether the frame of the charge gave the accused sufficient notice of the case to be met. [P 216 C 1, 2]

(b) Penal Code (1860), Ss. 148 and 97—If right of private defence is not established, claim of title though bona fide will not avail.

Unless right of private defence is established a claim (even bona fide) of title or a claim (even bona fide) of possession will avail nothing. There is no distinction between forming an assembly to enforce a right or supposed right within the meaning of S. 141 (fourthly) and forming an assembly forcibly to maintain an existing right and an assembly will be considered unlawful unless the defence has succeeded in establishing that the parties who committed the riot acted in private defence of the property

and did not exceed it: 16 Cal. 206, *Foll.*; 3 Pat. L. J. 419, *Ref.* [P 216 C 2]

(c) Criminal Trial—Questions of title—Expression of opinion on title must be limited to points necessary to determine.

The proper place for securing findings on questions of title is in a regularly constituted litigation inter partes and though there may be cases in a criminal Court where a question of title bears so directly on the matters to be tried that expression of opinion on it is unavoidable, such expression of opinion should be limited to cases where they are necessary and to points which it is necessary to determine. [P 217 C 1]

(d) Criminal Trial—Burden of proof—Best available evidence must be produced.

The party on whom the burden of proof lies cannot expect to succeed if he fails to produce the best evidence that he has available.

[P 217 C 1]

P. C. Manuk and R.K.L. Nandkeolyar
—for Appellants.

W. H. Akbari for Asst. Govt. Advocate
—for the Crown.

Judgment.—The four appellants were tried by the Sessions Judge of Purnea on a series of charges of which one charge under S. 148, I. P. C., was common to all the accused while individually Ghyasuddin was charged under S. 302 for the murder of Jainarain. Muhammad Ishaque was charged under S. 324, I. P. C., for causing hurt to Pearey Mohan, and the other two appellants under S. 324 for causing hurt to Degdhu Singh. There was a charge against appellants 2 to 4 under S. 302 read with S. 149, I. P. C., in respect of the killing of Jainarain by a member of the unlawful assembly which included these accused persons. The common object alleged in the rioting charge as framed by the committing Magistrate was:

"to prevent Jainarain Singh from reaping his tori crop and to assault Jainarain and his party."

For some reason which is not explained at the trial the words, "to assault Jainarain and his party" were deleted at the instance of the Public Prosecutor. The charge was not an improvement. It opened the way for the defence to contend, as it has been contended before us at length, that the common object failed and the accused were entitled to be acquitted of the charge of rioting unless the prosecution could affirmatively establish that the crop was sown by Jainarain. We shall deal with that contention in due course; but there would have been no room for it at all had the learned Sessions Judge allowed the charge to stand as originally framed.

The defence on the merits was two-fold : first, that the crop was not grown by Jainarain but by Udho Singh, a tenant of Ghyasuddin, and that though in defence of his rights an assembly of men did collect, whatever they did was done in the exercise of the right of private defence. Secondly, that none of the appellants was a member of that assembly or took part in the occurrence. Defence evidence was given on both points.

The Sessions Judge, in agreement with all the assessors, found that the specific charge against Ghyasuddin of killing Jainarain with his own hand was not proved and acquitted him on that charge. All the other charges he found established, disagreeing with all four assessors.

We were addressed for days on the question of title and possession ; but before setting out to explore that large field of inquiry, it will be convenient first to focus the points for decision ; the question of title and even of possession is only relevant in so far as it has a bearing on those points. Had the charge stood as originally framed, it would have been obvious and incontestable that there were then but two questions, namely: (a) Who took part in the attack? and (b) Had they acted in, and within the limits, of the right of private defence? The charge as it now stands includes or implies the following averments of fact. The accused took part in an assembly ; their object was to prevent Jainarain from reaping a tori crop ; that crop was Jainarain's ; in the circumstances the assembly was unlawful ; and force and violence were used. Now suppose the prosecution evidence establishes the first two propositions, but not the third ; then the question is whether the fourth proposition, that the assembly was unlawful, follows from the first and second in the absence of the third proposition. When the charge is thus analyzed into its essentials, it is manifest that under the circumstances stated the assembly must have been unlawful unless it acted in the exercise of the right of private defence. It is contended that if proposition No. 3 is excluded the charge becomes a different charge, to which the accused were not called on to plead and on which therefore they cannot be convicted. But the contention is unsound. If the prosecution has not proved all the facts which it

was proposed to prove, but has proved some of those facts, what we have to see is whether those facts which have been proved amount to the offence charged and whether the frame of the charge gave the accused sufficient notice of the case to be met. From this point of view we feel no difficulty in holding that as soon as the prosecution has established the first two propositions, the facts are within the statutory definition of "rioting" and the whole conduct of the case leaves no doubt whatever that the accused had notice of the place, time and manner in which the riot was alleged to have been committed.

That being so, members of the assembly are guilty and can be convicted of rioting unless the acts were done in the exercise of the right of private defence. Unless a right of private defence is established, a claim (even bona fide) of title or a claim (even bona fide) of possession will avail nothing. At one time it was held that there was a distinction between forming an assembly to enforce a right or supposed right within the meaning of S. 141 (fourthly), I. P. C., and forming an assembly forcibly to maintain an existing right and that an assembly will be considered not unlawful unless the prosecution could show affirmatively that it was an assembly of the former description and not of the latter. The decisions in which that view was expressed were considered at length in *Ganouri Lal Das v. Queen-Empress* (1) and this line of argument which as the Judges pointed out "possesses an attractive subtlety," was definitely, and one would have thought conclusively, negatived. So far as the Patna High Court is concerned, we are not aware of any decision in which the principles enunciated in *Ganouri Lal's* case (1) have been dissented from. *Fouzdar Rai v. Emperor* (2) was similar in its facts to several of the cases in which the "attractively subtle" argument had been raised. The report does not show whether it was raised in argument, but the Judges in deciding the case clearly proceeded on the finding that the accused had established a right of private defence and had not been shown to have exceeded it. Nevertheless in the mofussil Courts this unsound argument is constantly re-

(1) [1889] 16 Cal. 206.

(2) [1917] 3 Pat. L. J. 419=19 Cr. L. J. 241=44 I. C. 33.

vived and often embarrasses the trial. It seems to us necessary to reaffirm the principle laid down in the case of *Ganouri Lal Das v. Queen-Empress* (1) for the guidance of the Courts in this province.

There has been an attempt in the case before us to secure findings on the question of title which Ghyasuddin or Jalil, as the case may be, would doubtless have used as evidence in subsequent disputes. Now the proper place for such findings is in a regularly constituted litigation inter partes and though there may be cases in a criminal Court where a question of title bears so directly on the matters to be tried that expression of opinion on it is unavoidable, we would point out that such expressions of opinion should be limited to cases where they are necessary and to points which it is necessary to determine. Following this rule we shall express neither agreement nor disagreement with what the Sessions Judge has said regarding title; we shall not record a finding whether Jainarain's possession has or has not been affirmatively established by the prosecution. The point we have to determine is whether it is proved that Udoro Singh had grown this tori crop and that his possession required to be protected by force against the offence of theft on the morning of 19th January when Jainarain began to reap the crop. On this point the defence case was that the management and cultivation of the holding were done by Udoro, a boy of 14, and his uncle Nandu. The defence examined no independent witness; this in itself need not have been fatal to their case for it was perhaps hardly to be expected that independent witnesses would be forthcoming but the defence after putting Udoro in the box deliberately abstained from examining Nandu, the more competent witness of the two and the man who should have been the best witness of all to prove possession. No explanation is given for not calling him. Indeed he was present in the Court compound during the trial. The party on whom the burden of proof lies cannot expect to succeed if he fails to produce the best evidence that he has available, and it must be held that the defence have failed to establish that the parties who committed the riot acted in private defence of the property of Udoro Singh. (After discussing the evi-

dence, the judgment concluded.) The result is that the appeal of Ghyasuddin is allowed and he is acquitted. The convictions of the other appellants under Ss. 148 and 302/149, I. P. C., are confirmed; their convictions under S. 324 are set aside. The sentences of seven years' rigorous imprisonment each are on the side of severity and are reduced to five years' rigorous imprisonment each.

K.N./R.K.

Order accordingly.

A. I. R. 1932 Patna 217

KULWANT SAHAY AND SCROOPE, JJ.

Narku Mahton and others—Appellants.

v.

(Kumar) Kamakhya Narayan Singh—Respondent.

Misc. Appeal No. 107 of 1931, Decided on 20th July 1931.

(a) **Patna High Court Rules, Ch. 2, R. 13—Registrar has no power to hear application under Civil P. C. (1908), O. 41, R. 8.**

Under the Patna High Court Rules the Registrar has no power to hear an application under O. 41, R. 8. [P 218 C 1]

(b) **Patna High Court Rules, Ch. 3, R. 12—Affidavit by clerk of advocate for applicant for stay of execution swearing to facts in application on information received and believed to be true is good affidavit.**

An affidavit, filed by the clerk of the advocate for the applicant for stay of execution swearing that the facts stated in the application: viz., that the applicant is an agriculturist, that there is general economic depression and that the village would not fetch adequate price are true to the information received by him from the advocate and the applicant and believed to be true, is a good affidavit. [P 218 C 2]

*B. C. De—*for Appellant.

*Shiveshwar Dayal, Govt. Pleader—*for Respondent.

Order.—This is an application on behalf of the appellant in Miscellaneous Appeal No. 107 of 1931 for stay of execution of the decree pending hearing of an appeal against an order made in the proceeding relating to the execution of that decree.

The first question for consideration is that raised by the learned Registrar in his order of 17th July 1931. The question is as regards the procedure for hearing applications under O. 41, R. 8, Civil P. C. The learned Registrar has stated that it is doubtful whether the Registrar has jurisdiction to hear such applications. R. 13 (9), Ch. 2, Patna High Court Rules gives the power to the Registrar to receive and dispose of an

application under O. 41, Rr. 5, 6 and 10. R. 8 is omitted. It is therefore clear that the Registrar has no power to hear applications under O. 41, R. 8. It is however contended by the learned advocate for the appellant that such applications are comprised in O. 41, R. 5. Sub-R. (1), R. 5 first provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order. This is a general provision applying to appeals both against decrees as well as against orders. The sub-rule then proceeds and says:

"Nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate Court may for sufficient cause order stay of execution of such decree."

This provision refers only to the stay of execution of a decree and not to the stay of execution of an order. Provision for stay of the execution of an order is made in R. 8 which says that the powers conferred by Rr. 5 and 6 shall be exercisable where an appeal may be and has been preferred not from the decree but from an order made in execution of such decree. It is thus clear that under the Patna High Court Rules the Registrar has no power to hear an application under O. 41, R. 8. We do not however see why power should be given to the Registrar to hear applications under O. 41, Rr. 5 and 6 and not under R. 8. The rules as they stand do not empower the Registrar to hear such applications.

On the merits, having regard to the circumstances, this is a proper case for stay of execution pending the hearing of the appeal. But such stay will be allowed on the petitioner depositing a sum of Rs. 300 in cash for payment to the decree-holder before the properties are put up for sale and for the balance of the decretal amount the appellant must furnish security to the satisfaction of the Court below.

Mr. Shiveswar Dayal has raised a question as regards the sufficiency of the affidavit filed by the petitioner. The affidavit has been made by Raghunandan Missir, who is the clerk of Mr. B. C. De, the advocate for the petitioner, and he states that the facts stated in the petition are true to his information received from Mr. Prafulla Chandra Mitter, Advocate, Hazaribagh, and from the appellant Narku Mahto which he

says he believes to be true. It is contended that such an affidavit made by the clerk of the advocate upon information received from the Hazaribagh advocate of the appellant and from the appellant himself is not a sufficient affidavit. The facts however which are sworn to are simply to the effect that the petitioner is an agriculturist and is unable to raise the amount in cash on account of the present economic depression and that if the village is sold now it will not fetch an adequate price and that it will be impossible for the appellant to recover it even if the appeal succeeds. As regards the economic depression that is a fact which can be sworn to by any person who has got knowledge of that fact. As regards the property fetching an inadequate price, nobody can swear an affidavit to this effect as it is impossible to say before sale what price the property will fetch. All that the appellant can swear to is as regards an apprehension that the property may not fetch an adequate price. If information of these facts is given to an advocate's clerk and the clerk believes such information to be true, we do not see why an affidavit swearing to such facts on information should not be a good affidavit within the meaning of R. 12, Ch. 3, Patna High Court Rules and the present affidavit conforms with the said rule.

S.N./R.K. *Application granted.*

A. I. R. 1932 Patna 218

JWALA PRASAD, J.

Mohammad Hossain—Defendant—Appellant.

v.

Mangilal Jaipuria — Plaintiff—Respondent.

Second Appeal No. 764 of 1930, Decided on 9th December 1931, against decision of Judl. Commr., Manbhum-Sambalpur, D/- 1st March 1930.

(a) *Chota Nagpur Tenancy Act (1908), S. 46 (6)—Notification under R. 2—"Same tribe or caste."*

The words "same tribe or caste" used in R. 2 embrace a case where the original tenant becomes a Mussalman of the same tribe as the transferee. [P 219 C 2]

(b) *Chota Nagpur Tenancy Act (1908), S. 46 (2) and (6)—Notification under Cl. (6) does not make transfer by raiyat without his consent in writing binding on landlord.*

Notification under S. 46 (6) validates a transfer which would be invalid under S. 46 (1). A transfer by a raiyat however even if the transferor and the transferee both belong to the same

tribe or caste, or both reside in the same village is not binding on the landlord because under S. 46 (2) no transfer by a raiyat of his right in his holding or any portion thereof shall be binding on the landlord, unless it is made with his consent in writing. [P 219 C 2]

Ahmad Raza—for Appellant.

R. S. Chatterji—for Respondent.

Judgment.—This is an appeal by defendant Muhammad Hussain. On 23rd December 1924 a holding situate in Mauza Kakri Sole belonging to one Niroda Bagdini was sold to him by a registered sale-deed (Ex. B). The plaintiff is a pardhan of Kakri Sole and the suit out of which this appeal has arisen was brought by him for recovery of possession of the holding on the allegation that the act of Niroda Bagdini in selling the entire holding constituted an abandonment thereof and consequently the holding reverted to the plaintiff. Niroda Bagdini became a Mussalman and is now living in village Chakulia where according to the case of the plaintiff the defendant resides. The defendant resists the allegation of the plaintiff and contends that there has been no abandonment at all and that he resides in Kakri Sole where the land in question is situate. This contention is based upon a notification issued under S. 46 (6), Chota Nagpur Tenancy Act. The rules framed under the section were published by this notification, No. 310-11-5 R. T., dated 29th June 1924. R. 2 of these rules confers on a raiyat the right to transfer his entire holding or with the consent of the Deputy Commissioner a part thereof to another person who is, "of the same tribe or caste as himself and resides in the same village or an adjoining village belonging to the same landlord."

The Courts below have held that the defendant does not reside in the same village, namely, Kakri Sole, but in a different village Chakulia. This finding is disputed by the learned advocate on behalf of the defendant-appellant. The finding however is one of fact based on appreciation of the evidence and cannot therefore be challenged in second appeal.

It has also been held by the Courts below that Muhammad Hossain the transferee-defendant is not of the same tribe or caste as the original tenant Niroda Bagdini although she became a Mussalman. The learned advocate for the appellant contends that this is wrong inasmuch as Niroda Bagdini by conversion became a Sheikh and Muhammad Hussain is of the

same caste or tribe. There is some force in this contention. True, there is no caste among the Muhammadans, but by conversion Niroda Bagdini came to belong to the same tribe as Muhammad Hossain; and the words "same tribe or caste" were to my mind used in the Act to embrace a case of this nature. But the finding does not bring the case within the purview of the notification referred to above, for the transferee must not only be of the same tribe or caste as the transferor, but must live in the same village or an adjoining village belonging to the same landlord. The finding of the Court below cannot be disturbed.

The case however stands on an altogether higher footing. The notification under Cl. (6), S. 46, validates a transfer which would be invalid under Cl. 1, S. 46. Under sub-Cl. (b), Cl. (1), S. 46, no transfer "by sale or gift" by a raiyat is "valid to any extent." In this case the plaintiff says that the transfer is not binding upon him under Cl. (2), S. 46, which says :

"No transfer by a raiyat of his right in his holding or any portion thereof shall be binding on the landlord, unless it is made with his consent in writing."

The notification therefore has no application to the present case and the Courts below have missed Cl. (2), S. 46. An attempt was made by the defendant to show that the transfer was made with the consent of the landlord inasmuch as he accepted salami. This is a question of fact and has been negatived by the findings of the Courts below. It has never been pleaded in this case that there was any "consent in writing" as is required by Cl. (2) of the section. Therefore the transfer in this case, whether the defendant be of the same tribe or caste as the transferor Niroda Bagdini or both reside in the same village, is not binding upon the plaintiff landlord. The decree made in favour of the plaintiff by the Courts below must therefore be maintained. The decree is to the effect that the plaintiff will be entitled to recover possession of the property :

"subject to the right, if any, of Nirode (the original tenant) who is not a party to this suit to apply under S. 73, Cl. (3), Chota Nagpur Tenancy Act, for being restored to possession."

This form of decree opens out a door to future litigation and therefore the parties, who are present in Court personally, through the intervention of their

respective advocates, have settled their dispute on the following terms. The plaintiff has agreed to recognize the transfer and to allow the defendant to remain in possession of the property in place of the original tenant Niroda Bagdini, provided the defendant pays to the plaintiff by 9th March 1932 Rs. 200 as salami, which includes the back rents, and enhances the rent of the land in dispute from Re. 1-8-0 to Rs. 5 a year. The enhanced rent will be payable from the month of Aswin of the current year. The aforesaid sum will be paid by the defendant to the plaintiff within the time specified above in addition to the legal costs incurred by the plaintiff in this Court and in the Courts below which costs the plaintiff is entitled to recover from the defendant in any case, either the aforesaid sum of Rs. 200 is paid or not. The defendant must make the deposit in the Court below on or before 9th March 1932 as stated above, failing which the appeal will stand dismissed with costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1932 Patna 220**

FAZL ALI, J.

Corporation of Municipal Commissioners, Ranchi—Petitioners.

v.

Mt. Mungia—Opposite Party.

Civil Revn. No. 402 of 1931, Decided on 16th December 1931, against decision of Small Cause Court Judge, Ranchi, D/- 28th April 1931.

(a) **Provincial Small Cause Courts Act (1887), Art. 13—Suit by Municipality to recover arrears of Municipal taxes (house and latrine tax), is cognizable by Small Cause Courts.**

Article 13 excludes suits to enforce payment of cesses or other dues when these are payable to a person by reason of his interest in immovable property. A Municipality has no such interest in the holdings situated in the Municipal area as is contemplated by the use of that expression in Art. 13 and its taxes do not therefore come under the exceptions mentioned in that article. Suit to enforce payment of such taxes is therefore cognizable by a Court of Small Causes; 9 *Mad.* 110 held no longer good law. [P 221 C 1]

(b) **Provincial Small Causes Court Act (1887), Art. 13—"Dues" must be read in restricted sense.**

The expression "dues" as used in Art. 13 must be read in a restricted sense and ejusdem generis with the other dues mentioned therein. Municipal taxes sought to be recovered do not

fall within Art. 13 or any other article subject to which S. 15 is to be read: 21 *Mad.* 243, *Foll.* [P 221 C 1]

*Shiveshwar Dayal—*for Petitioners.

Judgment.—The question to be decided in this case is whether a suit to recover the arrears of certain Municipal taxes, such as the house and latrine tax, is cognizable by a Court of Small Causes or not. The learned Munsif of Ranchi against whose decision the present application has been preferred has held that a Small Cause Court has no jurisdiction to try such a suit and has relied on *Logan v. Kunji* (1) and Art. 13, Sch. 2, Provincial Small Cause Courts Act. It may be stated at once that the case referred to by the learned Court below was decided under the old Act and is therefore no longer an authority to be followed. As the learned Munsif himself observes the scheme of the present Act is quite different from the scheme of the old Act, inasmuch as while the former Act expressly stated what classes of cases were cognizable by the Small Cause Court, the present Act details under Sch. 2 the suits which are excluded from the jurisdiction of such Court. The question then arises as to whether the present suit falls within the exceptions referred to in Sch. 2. The learned Court below is of opinion that under Art. 13 the present suit is not cognizable by a Court of Small Causes, Art. 13 relates to:

"a suit to enforce payment of the allowance or fees respectively called malikana and *hak* or of cesses or other dues when cesses or dues are payable to a person by reason of his interest in the immovable property or in hereditary office or in a shrine or other religious institution."

The first point to be determined is whether a Municipality has any such "interest in any immovable property" as is referred to in Art. 13. Mr. Shiveshwar Dayal, who appears in support of the application, contends that the Municipality has no "interest in immovable property" and clinches his argument by referring to the fact that in case any of the holdings which were to be sold are acquired by the Land Acquisition Department the Municipality could not claim any share in the proceeds of the sale or the compensation that might be payable upon such acquisition. Now although I recognize that the term "interest" is wider than "proprietary in-

(1) [1885] 9 *Mad.* 110.

terest," yet having regard to the context in which the expression is used, it is in my judgment difficult to hold that the Municipality has any such interest in the holdings situated within the Municipal area as is contemplated by the use of the expression in Art. 13.

Another point which might be noted is that the expression "dues" as used in Art. 13 must be read in a restricted sense and ejusdem generis with the other dues mentioned therein. This was emphasized in *Venkatagiri Rajah v. Venkat Rau* (2) and with that view I entirely agree. I am of opinion therefore that the taxes sought to be recovered do not fall within Art. 13 or any other article subject to which S. 15, Small Cause Courts Act, is to be read and that the present suit was cognizable by a Court of Small Causes. I would therefore allow this application, set aside the decision of the Court below and direct that the plaint, returned by the learned Court below be re-admitted and that the learned Court below do proceed to dispose of the suit according to law. As no one opposes this application there will be no order for costs. The petitioners are directed to present the plaint in the Court below within a month from today.

B.R./R.K. *Revision allowed.*

(2) [1897] 21 Mad. 243.

A. I. R. 1932 Patna 221

MACPHERSON AND ROWLAND, JJ.

Deo Narayan Misra — Plaintiff — Appellant.

v.

Bhajan Mahton and others — Defendants — Respondents.

Second Appeal No. 1172 of 1929, Decided on 24th February 1932, against decision of Dist. Judge, Gaya, D/- 1st May 1929.

Bengal Tenancy Act (1885), S. 188—Suit for enhancement of rent—Person not 16 annas landlord cannot maintain such suit without joining remaining cosharer landlords.

An agreement by a tenant with some of several joint landlords to pay separately to them a fixed amount on account of their share of the rent does not constitute a separate tenancy and does not, in a suit for enhancement, relieve such cosharer landlord from the bar imposed by S. 188. Therefore a suit for enhancement of rent by a person who is not a 16 annas landlord of the holding without joining the remaining cosharer landlords is not maintainable; 38 Cal. 270, *Foll.*; 35 Cal. 417, *not Foll.*; 25 Cal. 917; 17 Cal. 695 and 25 Cal. 917n, *Ref.* [P 221 C 1]

S. N. Roy and Ganesh Sharma — for Appellant.

B. C. Sinha — for Respondents.

Rowland J.—This is an appeal by the plaintiff arising out of a suit for rent and for enhancement of rent under S. 30, Cl. (b), Ben. Ten. Act, and the only question for decision is whether the District Judge was right to disallow the enhancement on the ground that the plaintiff was not the 16 annas landlord of the holding and could not maintain the suit for enhancement in the absence of the remaining cosharer landlords. From the Record of Rights it appears that there is a mukarrari tenure of 42 bighas 5 kathas 9 dhurs (25.38 acres) of land in mauza Rahra. The holders of it are Deonandan Pathak, Ambika Pathak and the plaintiff Deonarayan Misser (the interest of the plaintiff standing in the name of his wife Bindbasini, who is his farzidar). Within this mukarrari the defendants have an occupancy holding of 17.18 acres. For this area they pay rent separately to Bindbasini (or plaintiff) and to Deonandan and Ambika under two separate registered leases, the rent payable to Bindbasini (or plaintiff) being Rs. 66-12-0 and that payable to Deonandan and Ambika being Rs. 49-5-9. The two sets of landlords realize their rents separately. The District Judge relied on S. 188, Ben. Ten. Act, as explained in *Rai Jatindra Nath v. Prasanna Kumar* (1). For the appellant we were referred to *Jognesh Prokash Ganguli v. Maniraddi* (2), but that was a decision given before the Privy Council ruling just cited. It proceeded on the ground that one of several landlords to whom a fixed amount of rent was separately payable under an agreement might not be a joint landlord within the meaning of S. 188, although he remains a joint owner. A reference to the report of *Rai Jatindra Nath v. Prasanna Kumar* (1) shows that this same contention was raised before the Privy Council, but it does not seem to have found favour with their Lordships. On the other hand, it has been repeatedly held that an agreement by a tenant with some of several joint landlords to pay separately to them a fixed amount on account of their share of the rent does not constitute a separate ten-

(1) [1910] 38 Cal. 270 = 38 I. A. 1 = 8 I. C. 842 (P.C.).

(2) [1908] 35 Cal. 417.

ancy and does not, in a suit for enhancement, relieve such cosharer landlord from the bar imposed by S. 188. For a clear statement of the principle I would refer to *Baidya Nath De Sarkar v. Ilim* (3) which followed *Gopal Chunder Das v. Umesh Narain* (4) and the unreported case of *Hari Charan Bose v. Ranjit Singh* (5). These decisions also were cited before the Judicial Committee in *Rai Jatindra Nath v. Prasanna Kumar* (1), and the decision of the Judicial Committee maintained the principle which these decisions had affirmed.

The decision of the District Judge was correct and must be affirmed. The appeal is dismissed with costs.

Macpherson, J.—I agree.

K.N./R.K.

Appeal dismissed.

(3) [1897] 25 Cal. 917=2 C. W. N. 44.

(4) [1890] 17 Cal. 695.

(5) [1896] 25 Cal. 917n=1 C. W. N. 521.

A. I. R. 1932 Patna 222

KULWANT SAHAY AND JAMES, JJ.

Sheogobind Ram—Plaintiff — Appellant.

v.

Mt. Kishunbansi Kuer—Defendant—Respondent.

Appeal No. 170 of 1931, Decided on 29th January 1932, against appellate order of Dist. Judge, Shahabad, D/- 21st May 1931.

(a) **Limitation Act (1908), Arts. 176 and 177—Applicability.**

Provisions as regards substitution do not apply to execution proceedings. [P 223 C 1]

(b) **Civil P. C. (1908), O. 21, Rr. 17 (3) and 22—Application to execute decree passed on 22nd July 1927 made on 15th July 1930—Return of notice under O. 17, R. 22 showing that judgment-debtor was dead—Time given for correction till 29th July 1930—Application for amendment by substitution made on 28th July and granted on 29th July—Application of 15th July becomes operative when it was amended by order of 29th July and must be treated as having been filed on that day for purposes of limitation—Application of 15th July is step-in-aid of execution within Limitation Act (1908), Art. 182.**

An application was filed on 15th July 1930 to execute a decree passed on 22nd July 1927. Notice under O. 21, R. 22, was ordered to issue and it was received unserved with the report that the judgment-debtor was dead. The Court thereupon ordered the decree-holder to take proper steps and fixed time for doing so up to 29th July 1930. An application was filed by the decree-holder on 28th July 1930 praying for substitution of M, the representative of the deceased judgment-debtor, and the prayer was granted on 29th July. M contended that the application as against him was barred by limitation

and that the amendment was not signed or initialled by the Judge:

Held: that an order for amendment when a defect was brought to the notice of the Court was an order under O. 21, R. 17, and had the effect that the amendment relates back to the date of the original application and consequently when the application was amended by the order of 29th July, the application of 15th July became effective and must be treated as having been filed on that date for purposes of limitation;

Held further, that the fact there was an order in the order sheet in the writing of the Judge directing the substitution to be made and signed by him was a sufficient compliance with the provision of O. 21, R. 17 (3), even though the correction made in the application of 15th July in pursuance of the order made on 29th July might not have been signed by the Judge;

Held further, that the application of 15th July was a step-in-aid of execution although it was made against dead judgment-debtor;

Held also: that the issue of the notice under O. 21, R. 22, had the effect of giving a fresh start to the period of limitation. [P 223 C 1, 2; P 224 C 1]

Hareshwar Prasad Sinha, Guru Dayal Sahay and Tarkeswar Nath—for Appellant.

B. P. Sinha—for Respondent.

Kulwant Sahay, J.—The respondent obtained a decree against one Mt. Jadui on 21st June 1923. This decree was affirmed on appeal on the 31st July 1924 and on second appeal by the High Court on 22nd July 1927. On 15th July 1930 an application for execution of this decree was filed by the respondent against Mt. Jadui. The application was ordered to be registered and notice under O. 21, R. 22, Civil P. C., was ordered to be issued on 15th July 1930, fixing 22nd July 1930 for return. This notice was received unserved with the report that the judgment-debtor was dead. On 22nd July 1930 the Court directed the decree-holder to take proper steps and fixed the time for doing so up to 29th July 1930. On 28th July 1930 the decree-holder filed an application stating that the original judgment-debtor Mt. Jadui was dead and praying to substitute Sheogobind Kahar, her grandson, in her place. This application was taken up by the Munsif on 29th July 1930 on which date he ordered that Sheogobind Kahar be substituted as prayed for. Notice of the application was then served on Sheogobind Kahar, and on receipt of this notice, he filed an objection to the execution, on the ground that the application for execution was barred by limitation. His point was that the original judgment-debtor had died some time in February 1930 and the application made on 28th July 1930 was

barred by limitation. The learned Munsif upheld this objection and found that the application was barred, on the footing that that application was an application for substitution and was consequently barred under Art. 177, Lim. Act, as it was presented more than 90 days after the death. The decree-holder thereupon went in appeal before the District Judge and the District Judge has pointed out that the provisions as regards substitution do not apply to execution proceedings and that the application of 28th July 1930 could not be held to be barred by limitation on this ground. In this view the learned District Judge was certainly right, and his decision is not challenged in this appeal by the learned advocate for the appellant, as indeed it could not be challenged having regard to the decision of the Full Bench of this Court in *Hakeem Syeed Mohammad Taki v. Rai Fateh Bahadur Singh* (1). It was however contended before the learned District Judge that in so far as Sheogobind Kahar was concerned the application for execution must be taken to have been filed on 28th July 1930 and was therefore barred by limitation as it was more than three years from the date of the final decree. The learned District Judge has held that the fact that the original application filed on 15th July 1930 was amended, brought the case under the provisions of O. 21, R. 17, sub-R. 2, Civil P. C., and the effect was that as against Sheogobind Kahar the amended application should be deemed to have been an application in accordance with law and presented on the date when it was originally presented on 15th July 1930. He has further held that the order for issue of a notice under O. 21, R. 22, saved the bar of limitation, and further that the application of 15th July 1930, although it was directed against the dead judgment-debtor, must be taken as a step-in aid of the execution which saved the present application made on 28th July 1930 from the bar of limitation. The learned advocate for the appellant has contested the correctness of each one of these findings. In my opinion the view taken by the learned District Judge was correct on all the points.

Under O. 21, R. 17, when an application is presented for execution, it is the duty of the Court to ascertain whether

it complies with the requirements of Rr. 11 to 14, and if it did not comply with the requirements of those rules, it was the duty of the Court either to reject the application or to allow the defects to be removed then and there or to order them to be removed within a time to be fixed by it. The application presented on 15th July 1930 did not comply with the requirements of O. 21, R. 11, inasmuch as the name of the person against whom execution of the decree was sought was incorrectly stated. It was however open to the Court either to reject the application or to allow it to be amended then and there, or to order the amendment to be made within a time to be fixed by it. The defect was not brought to the notice of the Court at the time the application was presented, and therefore it could not be removed then and there. The defect was brought to the notice of the Court on 22nd July 1930 and as soon as the fact was brought to the notice of the Court, it fixed a time, namely, up to 29th July 1930 to correct the mistake. The provisions of O. 21, R. 17 were therefore substantially complied with, and when in compliance with the order of the Court the decree-holder filed his application on 28th July 1930, that application must be taken as an application for amendment of the original application filed on 15th July for substitution of the name of Sheogobind Kahar in place of the deceased judgment-debtor as the person against whom the execution of the decree was sought. If that is so, then the fact of that amendment would be to treat the application for execution as validly presented on 15th July 1930.

It is contended on behalf of the appellant that the order for amendment could only be made by the Court at the time the application for execution was presented and could not be made on a subsequent date. It was however held in *Gnanendra Kumar v. Rishendra Kumar Roy* (2) that an order for amendment when a defect is brought to the notice of the Court is an order under O. 21, R. 17, and has the effect that the amendment relates back to the date of the original application. I am therefore of opinion that when the application was amended by the order of 29th July 1930, the application of 15th July became effective.

(1) A. I. R. 1929 Pat. 565=122 I.C. 148 (F.B.).

(2) [1918] 44 I.C. 553.

and must be treated as having been filed on that date for the purpose of limitation.

It is further contended that under the provisions of O. 21, R. 17 (3) the amendment made under this Rule should be signed or initialled by the Judge, and in the present case the application itself does not appear to have been signed or initialled by the Judge. On a reference to the application filed on 15th July 1930, I find that there is a correction made to the effect that under order dated 29th July 1930 Sheogobind Kahar was brought on the record in place of the judgment-debtor named who was dead, and there appears to be the initials of some officer below the endorsement. I am not in a position to say whether these initials are of the Munsif or of any clerk in the office. We have however got an order in the order sheet in the writing of the Munsif himself directing the substitution to be made and signed by him. This order with the signature of the Munsif sufficiently complies with the provisions of O. 21, R. 17 (3). The learned District Judge was also right in treating the application of 15th July 1930 as a step-in-aid of execution although it was made against dead judgment-debtor. This view is supported by the decision of this Court in *Puran Mall v. Mt. Dilwa* (3). It is true that a fresh application in tabular form was not presented on 28th July but this does not in any way affect the merits of the case. If the application of 15th July, although against the dead judgment-debtor, be treated as one in aid of execution then it will have the effect of saving the application filed on 28th July 1930 from the bar of limitation. Moreover, the issue of the order under O. 21, R. 22 has the effect of giving a fresh start to the period of limitation as held by the District Judge. The decision of the District Judge must be upheld and his appeal dismissed with costs.

James, J.—I agree.

P.N./R.K.

Appeal dismissed.

(3) A. I. R. 1924 Pat. 333=72 I.C. 1003.

A. I. R. 1932 Patna 224

ROWLAND, J.

Raghunath Thakur and others — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 39 of 1932, Decided on 17th February 1932, against order of Sess. Judge, Bhagalpur, D/- 13th January 1932.

Penal Code (1860), S. 430—Person cutting bandh and letting out some water is guilty under S. 430.

A person, cutting a bandh which belongs to the complainant and holds water required for the irrigation of his field, and letting out some of the water and thus diminishes the supply of water is guilty of the offence under S. 430, although if the bandh had not been cut the whole paddy crop of the accused would have been destroyed. 1 *Mad.* 262, *Foll.*; 8 *C. W. N.* 370, *not Foll.* [P 225 C 1]

G. N. Mukherji—for Petitioners.

Shiveshwar Dayal—for the Crown.

Judgment.—The petitioners have been convicted by a Second Class Magistrate of offences under Ss. 430, 325 and 323, I. P. C., and an appeal from the conviction has been dismissed by the Sessions Judge. They have moved this Court in revision, and the application has been ordered to be heard as regards the correctness of the conviction under S. 430, I. P. C. The substantial grounds taken in the petition with reference to S. 430 are grounds 1 and 2, which run as follows:

"1. For that the conviction of the petitioners under S. 430, I. P. C., is bad in law inasmuch as there was no malicious object on the part of the petitioners."

"2. For that the evidence of the complainant being that if the bandh had not been cut the whole paddy crop of the petitioners of about 1 to 1 1/2 bighas would have been destroyed the conviction under S. 430, I. P. C., is not sustainable."

The learned advocate for the petitioners has referred to three cases which it is said support the principle that where a dam erected by the complainant was cut by the accused not to take a supply of water but to save their own crops this would not amount to an offence under S. 430, Penal Code. The earliest of these cases *Nafar Chandra v. Helaluddin Mondal* (1) was decided *ex parte* by a Judge of the Calcutta High Court sitting singly; and each of the other cases relied on is the decision of a single Judge. No doubt, these decisions and the opinions of these learned Judges are entitled

(1) [1904] 8 *C. W. N.* 370.

A. I. R. 1932 Patna 241MACPHERSON AND MOHAMMAD
NOOR, JJ.*Bageshwari Ahir*—Petitioner.

v.

Emperor—Opposite Parties.

Criminal Revn. No. 415 of 1931, Decided on 5th November 1931, against order of Sess. Judge, Shahabad, D/- 25th July 1931.

(a) Penal Code (1860), S. 215—Conviction under S. 215—Evidence that articles are stolen is necessary.

Before a conviction under S. 215 can be sustained there must be evidence to show that the loss of the articles complained of was by means of the commission of an offence punishable under the Penal Code: in other words, where there is no evidence on the record to show that the articles were stolen, there can be no conviction under S. 215. [P 241 C 2]

(b) Criminal Trial—Conviction—Offence requiring certain facts—Conviction for, cannot be changed to one for offence requiring different set of facts.

A conviction for an offence for which a particular set of facts are required to be proved cannot be converted into a conviction for an offence of which quite a different set of facts are the constituents. [P 242 C 1]

Syed Ali Khan—for Petitioner.

Jafer Imam—for the Crown.

Mohammad Noor, J.—The two petitioners, Bageshwari Ahir and Jagdeo Nat, have been convicted under S. 215, I. P. C., and each of them has been sentenced to 18 months' rigorous imprisonment and to pay a fine of Rs 75, in default to suffer two month's further rigorous imprisonment. On appeal the conviction and sentence have been upheld by the Sessions Judge of Shahabad. The facts leading up to this conviction are these: One Isar Bind lost two bullocks. He had tied them to a peg at night and they were seen by him till about five gharis before dawn. In the morning they were missing. His attempts to find them out were unsuccessful. Later on, on 20th February one of the petitioners Bageshwari went to him and according to the story of Isar Bind in the first information told him that instead of running about uselessly in search of the bullocks he should pay some money to Bageshwari and he would then find out the bullocks. After some negotiations Isar Bind made over Rupees 20 to Bageshwari Ahir and Jagdeo Nat at the house of the latter. Afterwards the two petitioners did not recover the bullocks and put off the matter on some

pretext or other and ultimately on 6th March 1931, the complainant Isar Bind lodged the present case. Both the Courts have found that on the pretence of helping the complainant to recover the bullocks of which he was deprived by the commission of an offence punishable under the Penal Code the petitioners took money from the complainant without using all the means in their power to cause the offender to be apprehended.

Mr. Syed Ali Khan, on behalf of the petitioners, has raised a point of law which was also raised before the learned Sessions Judge. It is this: that before a conviction under S. 215 can be sustained there must be evidence to show that the loss of the bullocks was by means of the commission of an offence punishable under the Penal Code; in other words, he contends that there is no evidence on the record to show that the bullocks were stolen. It is conceded by the learned advocate on behalf of the Crown that there is no direct evidence to prove theft. The learned Sessions Judge, when dealing with this part of the case, has drawn an inference of theft from these facts: (1) that the bullocks, were tied in their legs' on the night of the occurrence and therefore they could not have gone astray; (2) that they were tied to pegs and (3) that had they not been stolen the petitioners would not have promised the complainant to find them out. As to the first point, I think that an error of record has been committed by the learned Sessions Judge. There is nothing on the record to show that the legs of the bullocks (by which perhaps the learned Sessions Judge meant the fore-feet) were tied. In cross-examination the complainant, on being asked about the number of cattle he had, stated that he had some buffaloes as well; and that on the night in question the fore-feet of the buffaloes were tied. The learned Sessions Judge perhaps thought that the complainant was making this statement about the bullocks.

About the second point, I think that the fact that the bullocks were tied to pegs does not eliminate the possibility of their having gone astray. They might have broken the rope and have gone away. Theft cannot be inferred from the fact that they were untraceable. About the promise of the petitioners, it is enough to say that the promise which

they made to find out the bullocks does not itself show that the bullocks were really stolen. They may have bargained for a search. In the statement which the complainant made in the first information, Ex. 1, he stated that Bagesh-wari told him that he would find out the bullocks. Therefore in this case there is no evidence of any offence having been committed in connexion with the bullocks. The contract between the complainant on the one hand and the two petitioners on the other was something of the nature of a civil contract and, even if believed, the utmost which can be held is that the petitioners did not carry out their part of the contract. The learned advocate on behalf of the Crown has asked us to consider whether the petitioners cannot be convicted for cheating under S. 417 or 420, I. P. C. We are unable to entertain this at this stage. First of all, the petitioners were not charged for the offence of cheating. If they had been so charged, it would have been open to them to show that they did all they could to find out the bullocks on behalf of the complainant and their failure to trace them was, in the circumstances, beyond their control, and that when they entered into the bargain with the complainant, they had no dishonest motive. A conviction for an offence for which a particular set of facts are required to be proved cannot be converted into a conviction for an offence of which quite a different set of facts are the constituents.

The conviction cannot be upheld. It is set aside and the petitioners if on bail, are discharged. If not they will forthwith be released. The fines, if paid, will be refunded.

Macpherson, J.—I agree. I think that these convictions are entirely unsustainable.

K.N./R.K.

Petition allowed.

A. I. R. 1932 Patna 242

WORT, J.

Mohammad Shafi—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 151 of 1932, Decided on 19th April 1932, against order of Sess. Judge, Gaya, D/- 25th February 1932.

Criminal P. C. (1898), Ss. 503 and 506—Ss. 503 and 506 should be used sparingly

and only in clearest possible case—Witness temporarily ill is no ground for examining him on commission.

Sections 503 and 506 should be used sparingly and only in the clearest possible case. In a criminal prosecution above all, the witnesses should be examined in open Court, giving an opportunity for the accused to examine them and it is only in those circumstances which are stated in Ss. 503 and 506 that an order directing examination of witnesses on commission can be made. The mere fact that a person is temporarily ill, is not a ground for allowing him to be examined on commission. [P 242 C 2]

Qazi Nazrul Hassan—for Petitioner.

Judgment. — This Rule is directed against an order of the District Magistrate, dated 17th February 1932, ordering two witnesses, namely, the father and his daughter, to be examined on commission in a criminal case in which as I understand the facts, the petitioner before me is being prosecuted for kidnapping. It appears that the Magistrate acted upon a certificate issued by the Civil Surgeon of Sambalpur in which he purports to state that the girl has been suffering from diarrhoea, indigestion and has stomatitis and has also a history of spitting of blood with low fever and cough. In the first place the certificate itself although most often taken in evidence in this country is not evidence at all. The surgeon issuing this certificate is the only proper witness to prove whether the person about whom he speaks is in the condition which he alleges. But quite apart from that technical point, the order is bad. In a criminal prosecution above all the witnesses should be examined in open Court, giving an opportunity for the accused to examine them and it is only in those circumstances which are stated in Ss. 503 and 506, Criminal P. C., that such an order could be made. The grounds under S. 506 under which section it appears the Court acted in this case are when a witness cannot be procured without an amount of "delay, expense or inconvenience" which, under the circumstances of the case, would be unreasonable. The mere fact that the girl is temporarily ill is not a ground for allowing her to be examined on commission and the fact that the Magistrate, who is superior to the father who is also a Magistrate cannot spare him is not a ground to allow either the girl or the father to be examined on commission. Ss. 503 and 506 should be used sparingly and only

in the clearest possible case. In my judgment this order does not come within the sections at all. It is therefore set aside and the father and daughter must be examined and cross-examined in open Court. The Rule is made absolute.

K.N./R.K. *Rule made absolute.*

A. I. R. 1932 Patna 243

ROWLAND, J.

Hiralal Sardar and others — Petitioners.

v.

Emperor—Opposite Party.

Civil Criminal Revns. Nos. 1 and 3 of 1932, Decided on 9th March 1932, against order of Dist. Judge, Manbhum-Sambalpur, D/- 14th January 1932.

(a) Criminal P. C. (1898), Ss. 195 (b) and 476—Court and occasion of offence must be stated.

A complaint under S. 195 read with S. 476 should disclose the Court before which and the occasion on which the offence is alleged to have been committed. [P 243 C 2]

(b) Criminal P. C. (1898), S. 476 — Revision — High Court will not lightly interfere with discretion of Subordinate Courts in prosecution under S. 476.

The propriety of the prosecution of certain persons for giving false evidence or for prosecuting a false claim is in the first instance a matter for the discretion of the Courts affected, a discretion with which the High Court in revision would not lightly interfere. [P 243 C 2]

(c) Criminal Trial—Onus of proof — Difference between, in civil suit and proceedings under S. 476 — In former it is on plaintiff, in latter on prosecution.

In a civil suit brought for the purpose of recovering money from a certain person on the allegation that he stood surety for the original debtor, the onus would be on the plaintiff to show that the defendant had stood surety as alleged. The case is however quite otherwise in a criminal proceeding started against the plaintiff for having deliberately prosecuted a false claim against the defendant. It will not be enough in a criminal proceeding to show that the plaintiff in the civil suit failed to discharge the burden of proof. It will not be enough to show that in the evidence adduced for the plaintiff there were discrepancies or improbabilities which made it impossible for the Court to rely with confidence on their evidence or even which made it improbable that the fact alleged was true. In a prosecution based on the allegation that a false claim was wilfully presented the prosecution will have to prove affirmatively that no guarantee was given, and that the case as brought by the plaintiff in the civil Court was false to his knowledge.

[P 244 C 1]

P. R. Das, J. Chatterji, B. N. Mitter, J. C. Sinha and K. N. Moitra—for Petitioners.

Shiveshwar Dayal—for the Crown.

Judgment. — These two applications in revision have been heard together as they arise out of a single set of proceedings and are both directed against one order of Mr. Anjani Kumar Sahai, Munsif of Jamshedpur of Chaibassa, dated 17th September 1931, directing the filing of a complaint against the petitioners under S. 476, Criminal P. C. The petitioners challenge the legality as well as the propriety of the order and of the complaint. The complaint recites that:

"it has been found that Hiralal, Baijnath, Bankim Behari and Bal Kishan (petitioners) have been guilty of a conspiracy to fraudulently obtain a decree from the Court of the Deputy Commissioner-Sub-Judge of Chaibassa. an offence under S. 210 read with S. 120-B, I. P. C., that accused Hiralal has further committed an offence under S. 209, I. P. C., by a false statement in the plaint of that suit and that accused Baijnath and Bankim Behari have further committed an offence under S. 193, I. P. C., by giving false evidence in support of the claim."

The legality of the complaint of the Munsif of Jamshedpur is challenged on the ground that under S. 195, Cl. (b), Criminal P. C., the only person or Court competent to complain of offences alleged to have been committed in the proceeding in the Court of the Deputy Commissioner-Subordinate Judge was the Deputy Commissioner-Sub-Judge or some other Court to which he was subordinate. In my opinion that contention must be given effect to. The complaint as it stands is bad and cannot proceed. It is contended for the opposite party that offences under S. 193, I. P. C., have been committed by Baijnath and Bankim Behari in the Court of the Munsif of Jamshedpur himself. If that were so, the Munsif should have said so in the complaint. There is ample authority for the proposition that a complaint under S. 195 read with S. 476, Criminal P. C., should disclose the Court before which and the occasion on which the offence is alleged to have been committed. The Munsif's complaint does not disclose that any of the offences of which he complains was committed before himself on any particular occasion.

Coming now to the question of the propriety of the prosecution of the petitioners, that is in the first instance a matter for the discretion of the Courts affected, a discretion with which this Court in revision would not lightly interfere and which I have no desire unduly to fetter; but I would like to point out that the examination of the facts on which the

Munsif based his order for a complaint was an inadequate examination and that if he contemplates preparing a fresh complaint avoiding the defects already pointed out there are other matters on the merits to which he will do well to have regard. The most important of these is that whereas in the original money suit proceedings went on on the footing that the burden of proof lay on the plaintiff to establish that the defendant Mr. Patel had stood surety as alleged, the case will be quite otherwise in any criminal proceeding. It will not be enough in a criminal proceeding to show that the plaintiff in the civil suit failed to discharge the burden of proof. It will not be enough to show that in the evidence adduced for the plaintiff there were discrepancies or improbabilities, which made it impossible for the Court to rely with confidence on their evidence or even which made it improbable that the fact alleged was true. In a prosecution based on the allegation that a false claim was wilfully presented the prosecution will have to prove affirmatively that no guarantee was given and the question will turn not only on the reliability of Hira Lal and his witnesses but on the reliability of Mr. Patel and any witnesses who may be called to support him.

The Munsif has said nothing so far by way of examination of the veracity of Mr. Patel, but at the hearing before me some certified copies of depositions Mr. Patel made on various occasions have been placed before me and I have no doubt that if the Munsif takes any further proceedings that they will in due course be placed before him. It appears to have been at one time denied and at another time admitted by Mr. Patel that at one time he did have his place of business at No. 6, Old China Bazar Street. The Munsif will have to consider the effect on the veracity of Mr. Patel of his having at one time denied this fact and at another been forced to admit it. I am told that it is admitted by Mr. Patel that on the occasion of the alleged verbal guarantee he was in the dak bungalow at Chaibassa as alleged by Hira Lal and his witnesses and had actually had a meeting on that day with defendants 1 and 2 of the original suit. All these are matters which the Court of first instance will have to consider in any proceeding that may be taken before deciding that there

is a reasonable chance of success in a prosecution of the petitioners and that on the facts of the case there ought to be a prosecution. The result is that the applications are allowed and the order for prosecution is set aside and the complaint quashed.

K.N./R.K.

*Applications allowed.***A. I. R. 1932 Patna 244**

MACPHERSON AND ROWLAND, JJ.

Karu Mahto and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 31 of 1932, Decided on 15th March 1932, against order of Sess. Judge, Patna, D/- 12th January 1932.

Civil P. C. (1908), O. 21, R. 22—Delivery of possession by Court passes possession notwithstanding non-service of notice.

Delivery of possession by the Court passes possession to the party and must be treated as doing so notwithstanding that notice under R. 22 has not been served. There is no want of jurisdiction in consequence of non-service of a notice under O. 21, R. 22, where the notice had in fact been issued and where it was found that the judgment-debtor had knowledge of the fact of issue of the notice as proved by his appearing and contesting the execution: *A. I. R. 1914 P. C. 129 and 25 Bom. 337, Dist*; *A. I. R. 1914 Cal. 286 and A. I. R. 1929 Pat. 79, Ref.*

[P 245 C 1, 2]

*Ali Imam and Baldeo Sahai—*for Petitioners.

Rowland, J.—This application is directed against the conviction of the seven petitioners under S. 147 and of individuals among them under Ss. 325 and 323, I. P. C., by the Subdivisional Magistrate of Bihar, an appeal from which was summarily dismissed by the Sessions Judge at Patna.

The facts out of which the case arose were that the master of the complainant is the landlord of a holding of the accused and had obtained a rent decree, execution of which was taken out. The holding it is said was purchased by the decree-holder and delivery of possession taken on 3rd July 1931. Five days later, that is to say, on 8th July 1931, the complainant Dasia Pasban with two barahils and four ploughmen of his malik went to plough the field and while doing so were attacked by a mob of persons including the petitioners who beat Dasia and those with him. The facts of the occurrence itself have not been agitated in revision and must be taken as concluded by the findings of the Court below.

The defence was that the accused were as always hitherto in possession of the field, that delivery of possession had not taken place that even if a peon had gone to deliver possession such delivery was without jurisdiction and was void because in the execution proceedings no notice under O. 21, R. 22, had been served on Karu, the judgment-debtor, in spite of the fact that the execution was taken out more than a year after the date of the decree. As regards the fact of service under O. 21, R. 22, the lower appellate Court did not deal at length with the evidence for this; it merely observed that there did not appear to have been any fraudulent suppression of process. Nevertheless it has been pointed out for the petitioners that there is evidence that Karu is illiterate and that, if so, the signature purporting to be his on the notice under O. 21, R. 22, cannot be his and may be presumed to be a forgery. It is contended that the case ought to be remitted to the lower appellate Court for a clear finding regarding the service of this notice on the ground that unless the service is established the *dakhaldeh* was without jurisdiction and entirely void and did not pass possession of the field. Before asking the lower appellate Court to reconsider the facts as to service of the notice under O. 21, R. 22, I will first examine the question whether to do so would or would not be infructuous. It would be infructuous if it would still be the duty of the Court to hold that possession of the fields passed by delivery of possession notwithstanding that a notice under O. 21, R. 22, had not been served. This is the view taken by the Magistrate who has relied on *Fateh Singh v. Emperor* (1), for the view that a delivery of possession by the Court passes possession to the party and must be treated as doing so even though the other side may allege the delivery of possession to be of doubtful legality.

In that case the Judges expressed no opinion as to the legality of the delivery of possession which was in fact sub-judice in another proceeding. Leaving that question aside they held that the delivery must be treated as having given as a matter of fact possession to the master of the petitioners before them.

(1) A. I. R. 1914 Cal. 286=20 I. C. 140=14 Cr. L. J. 380=41 Cal. 43.

The reasoning in that decision seems to be applicable to the facts before us. If it were necessary to examine independently for ourselves the question whether an execution taken after a year from the date of the decree against the original judgment-debtor and without notice to him is altogether void for want of jurisdiction, we might find that a matter of some difficulty. There are no doubt a number of decided cases in which it has been held that failure to serve notice under O. 21, R. 22 on the legal representative of a party to the decree leads to an absence of jurisdiction in the Court over such legal representative, for instance, *Raghunath Das v. Sundar Das Khetri* (2) decided by the Privy Council besides a number of cases decided in the High Courts. On the other hand there is the Privy Council decision in *Malkarjun v. Narhari* (3) where a judicial sale was held not to be a nullity notwithstanding that the notice under O. 21, R. 22 had been wrongly served on a person who was not the legal representative of the judgment-debtor's estate. But in these and other cases that have been referred to, the question has been as to the existence of jurisdiction in a Court against a person who had not been a party to the suit and had not previous to the issue of notice been made a party to the proceedings in execution.

It is not difficult to see the principle on which the jurisdiction of the Court might be denied in such a case. It may well be questioned whether once a party is before the Court and has suffered a decree he can subsequently cease to be under the jurisdiction of the Court for the purpose of execution proceedings by the mere lapse of a period exceeding one year and although the point never seems to have been specifically made the subject of a distinction between sub-Cls. (a) and (b), O. 21, R. 22 (1), there are recorded decisions in which the Courts seem to have been somewhat less willing to disturb execution proceedings when the judgment-debtors who objected to them had been parties to the original suit or to execution proceedings at an earlier stage. I may instance *Fakhrul Islam*

(2) A. I. R. 1914 P. C. 129=24 I. C. 304=41 I. A. 251=42 Cal. 72.

(3) [1901] 25 Bom. 337=27 I. A. 216=7 Sar. 739 (P.C.).

v. *Bhubaneshwari Kuar* (4). Here it was held that there was no want of jurisdiction in consequence of non-service of a notice under O. 21, R. 22 where the notice had in fact been issued and where it was found that the judgment-debtor had knowledge of the fact of issue of the notice as proved by his appearing and contesting the execution. This was the case of a judgment-debtor who had himself been a party to the original proceedings and that is also the case here. It seems to me then that on the facts before us to remit the case to the lower appellate Court for further findings of fact or further examination of the evidence would be infructuous because it must be held in any case that the delivery of possession passed possession to the master of the complainant and that the convictions on the charge of rioting must be supported. The application fails and the rule is discharged.

Macpherson, J.—I agree. In my opinion there is no reason to doubt that notice under O. 21, R. 22, was served upon Karu; if Karu did not himself sign it he got somebody to sign his name, as often happens. Again even if the notice was not served upon him, the delivery of possession is not void and cannot be ignored by the judgment-debtor. In point of fact not only did it duly take place but the accused were well aware that it had taken place.

K.N./R.K. *Rule discharged.*

(4) A. I. R. 1929 Pat. 79=117 I. C. 648=7 Pat. 790.

**** A. I. R. 1932 Patna 246**

COURTNEY-TERRELL, C. J. AND

DHAVLE, J.

Emperor

v.

Rafi Mian and others—Accused.

Jury Reference No. 3 of 1932, Decided on 21st June 1932, Reference made by Sess. Judge, Patna, D/- 19th May 1932.

(a) **Criminal P. C. (1898), S. 307—Unless Judge dissents completely from opinion of jury case should not be referred.**

Under S. 307 the Sessions Judge should not refer a case unless his dissent from the opinion of the jury is such a complete dissent as to lead the Judge to consider it necessary, for the ends of justice, to submit the case to the High Court, and where such complete dissent is not recorded the verdict of the jury must stand: 2 *Bom.* 525, *Ref.* [P 247 C 1]

**** (b) Criminal P. C. (1898), S. 307—Judge expressing dissent—Opinion of jury**

has no greater value than decision of tribunal of fact—Principle that verdict must be perverse is erroneous.

It is on the requirement of the law for this emphatic dissent on the part of the Sessions Judge that the strength of the verdict of a jury really rests. But if that dissent is expressed the special sanctity of a verdict disappears and it has no greater force than the decision of any other tribunal of fact: A. I. R. 1929 Pat. 313, *Appr.*

The view that even where the Sessions Judge has in fact recorded his complete dissent from the verdict of the jury in a reference under S. 307 the verdict of the jury cannot be attacked unless it can be shown to have been "perverse" or so manifestly erroneous that no reasonable man could have come to such a decision, is erroneous: *Case law discussed.* [P 247 C 2]

(c) **Criminal P. C. (1898), S. 307—Duty of High Court—High Court has all powers of appellate Court.**

The duty of the High Court in a reference under S. 307 is to consider the whole of the evidence and the opinions of the Sessions Judge, on the one hand, and of the jury on the other hand and thereupon, as directed by the statute, to exercise all the powers of the Court of appeal remembering that the duty of an appellate Court where an appeal is given on questions of fact, is to throw upon those who seek to disturb the verdict of the jury or other first tribunal of fact the onus of showing that that verdict is wrong. But if the party so seeking succeeds in demonstrating that the verdict is wrong the Court has full power to reverse the verdict: *Case law discussed.* [P 250 C 2]

Jafar Imam for Asst. Govt. Advocate—for the Crown.

B. B. Mukerji—for Accused.

Courtney-Terrell, C. J.—This is a reference under S. 307, Criminal P. C., by the Sessions Judge of Patna, relating to the verdict of the jury in the case of three persons, namely, Rafi Mian, Nasir Mian and Walayat Mian.

These three persons together with three others, namely, Didaran Mian, Siddiq Mian and Ismail Mian were tried for the murder of one Meghu Mian. The last three were acquitted by the jury and the Sessions Judge accepted the verdict. The first three were also acquitted but the Sessions Judge disagreed with the verdict and thought it necessary to refer the matter to this Court in the interests of justice. In view of the arguments which have been addressed to us some explanation of the law relating to jury trials is required. Under S. 307, Criminal P. C., if the Judge disagrees with the verdict of the jurors and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of his

opinion, and when the verdict is one of acquittal, stating the offence which he considers to have been committed. Now it has long been held that the Sessions Judge should not so refer a case unless his dissent from the opinion of the jury is such a complete dissent as to lead the Judge to consider it necessary for the ends of justice, to submit the case to the High Court, and where such complete dissent is not recorded the verdict of the jury must stand. This was laid down by Sir M. R. Westropp, C.J. and Melville, J. in *Imperatrix v. Bhawani Panduji* (1). That was a case of conviction by the jury and the Sessions Judge disagreed with the verdict of the majority. He stated that as

"it is entirely a case depending on the appreciation of the evidence and the habits and customs of the natives, and as they must be more familiar with the motives which actuate these people, and what they would be likely to do, than a foreigner,"

the Court refused to send up the case under S. 263 of the Act of 1872. The High Court refused to interfere with the decision. Similarly in the case of *Ramdas Rai v. Emperor* (2) the Sessions Judge in the case of a verdict of conviction had recorded his opinion as follows:

"I do not agree with the verdict. In my opinion none of the dacoits was recognized at the time and all the prisoners should be acquitted. At the same time the verdict of the majority is a reasonable verdict on the evidence and I accept it without hesitation."

On an appeal by the convicted persons it was argued that the Court should have referred the case under S. 307, Criminal P. C., and Macpherson, J., said:

"It has been frequently laid down that the High Court will not interfere with the verdict of the jury if the verdict has turned merely upon the appreciation of oral evidence capable of being viewed either way but only where the evidence is so coercive that it is impossible to draw a conclusion except the one adverse to the verdict. The observations of the learned Sessions Judge can only mean that though he himself took a view unfavourable to the prosecution nevertheless the view taken by the jury, though opposed to his own view, was one which could in his opinion reasonably be taken on the evidence."

The wording of the learned Judge's judgment is possibly open to misconstruction. The question to be decided in that case, was whether the Sessions Judge had been right in refusing to refer the case and the decision was, if I may respectfully say so, entirely right upon

that issue. It is on the requirement of the law for this emphatic dissent on the part of the Sessions Judge that the strength of the verdict of a jury really rests. But if that dissent is expressed the special sanctity of a verdict disappears and it has no greater force than the decision of any other tribunal of fact. It has however been suggested that the words of Macpherson, J., and similar words which have been used in other cases including, I regret to say, some of my own decisions imply that even where the Sessions Judge has in fact recorded his complete dissent from the verdict of the jury in a reference under S. 307, the verdict of the jury cannot be attacked unless it can be shown to have been "perverse" or so manifestly erroneous that no reasonable man could have come to such a decision. This is an erroneous view and is based upon certain judgments which were delivered before the amendment in the year 1896 which resulted in the section as it at present stands. Such decisions are no longer of any force. Sub-S. (3), S. 307, as it now stands is as follows:

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and if it convicts him, may pass such sentence as might have been passed by the Court of Session."

In the case of *Emperor v. Lyall* (3) at p. 133, dealing with the argument that the verdict of the jury must be shown to be perverse or clearly or manifestly wrong, Prinsep and Stephen, JJ., said:

"It seems to us that we are now bound to consider the entire evidence in the case, and we are then required to give due weight to the opinions of the Sessions Judge and the jury and not to rely only on the verdict of the jury. Without considering the evidence the High Court would not be in a proper position to give due weight to such opinions. It is not necessary for the prosecution to show that the opinions of the jury are perverse or clearly and manifestly wrong, as was held in the cases cited to us which were decided before the law was amended in 1896 and expressed as it now stands."

In the case of *Emperor v. Sri Narain Prasad* (4) at p. 718, a case in which the Sessions Judge of Patna had referred an acquittal by the jury under S. 307, Rampini and Gupta, JJ., said:

(1) [1878] 2 Bom. 525.

(2) A. I. R. 1929 Pat. 313=1929 Cr. C. 99=117 I.C. 173=30 Cr. L. J. 721=8 Pat. 344.

(3) [1901] 29 Cal. 128=6 C.W.N. 253.

(4) [1907] 11 C.W.N. 715=5 Cr.L.J. 484.

"We may mention that this is a reference under S. 307, Criminal P. C., and that although we are bound in dealing with it to give due weight to the opinion of the Sessions Judge and the verdict of the jury, we are entitled to make up our minds for ourselves on the question of the guilt or otherwise of the accused. After hearing the evidence we have no doubt whatever that the story of the prosecution is perfectly true and we feel no doubt that the accused has been guilty of cheating and of using a forged document as genuine."

In *Emperor v. Abdul Rahman* (5), Holmwood and Ryves, JJ., said:

"It was next contended that, as it was open to the jury, on their view of the evidence, to acquit the accused and that their verdict cannot fairly be called perverse, we should not set it aside. The provisions of S. 307, Criminal P. C., however are very clear. On a reference under that section this Court has all the powers of an appellate Court and it is our duty, after considering the entire evidence and giving due weight to the opinion of the Sessions Judge and the jury, to form our own opinion. If authority is required for this proposition, vide the case of *King-Emperor v. Lyall* (3)."

In the case of *Emperor v. Bimal Prasad* (6) a verdict of acquittal was referred by the Sessions Judge and the Court dealt with a large number of authorities upon this point. Scott-Smith and Martineau, JJ., referring to cases decided before the amendment of the Code said:

"We think that the authorities which lay down that the High Court will not interfere in a case referred under S. 307 unless it is shown that the verdict of the jury is wholly unreasonable or perverse, lose much of their force and really have very little application. We consider that it is our duty in the present case to consider all the evidence and to give judgment after considering it as well as the opinions of the Sessions Judge and the jury."

In *Emperor v. Ram Chandra Roy* (7) at p. 885 (of 55 Cal.) which was a reference by the Sessions Judge on a unanimous verdict of acquittal by the jury, Cumming, J., with whose opinion Gregory, J., agreed said:

"Mr. Bose who has appeared for the three accused persons has first argued that before we can interfere with the jury's verdict, we must be convinced that this verdict is perverse or patently wrong and that we should not interfere with the jury's verdict unless it is manifestly or patently wrong. The point of view from which reference under S. 307, should be considered by the High Court has been the subject of numerous judicial decisions. They seem to vary from the extreme view that the High Court should be very reluctant to interfere with a verdict of a jury to the view that the High Court in dealing with these references is

to be guided by the plain words of the Code. Speaking for myself, I have always thought that I am upon far firmer ground if I adhere to the strict words of the Code and do not attempt to interpret the Code in the light of the practice in other countries where law and conditions are different. Here the Code is clearly explicit. The High Court shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and of the jury, acquit or convict the accused. The Code would not seem to put the opinion of the jury on any higher plane than the opinion of the Judge; both should be given due weight. There is no suggestion that more weight should be given to the opinion of the jury than that of the Judge. Speaking for myself, I should, as a general rule, be inclined to attach more weight to the opinion of the learned Sessions Judge. He equally with the jury has heard the witnesses and has been able to observe their demeanour. He has been trained to weigh and appreciate evidence and further he must give reasons for his opinion. The jury are a body of laymen unaccustomed to weigh or appreciate evidence who give no reason for their opinion. Obviously, an opinion supported by reasons is likely to carry more weight than an opinion entirely unsupported by reasons."

I may now deal with other cases decided since 1896, which have from time to time been used to support the argument that the verdict of the jury cannot be interfered with unless it is perverse or manifestly unreasonable. The first of these is *Emperor v. Ali Haider* (8), decided by Mullick and Bucknill, JJ. The facts are expressly left unreported. Mullick, J. said:

"There is sufficient evidence to prove the guilt of the accused and the verdict of the jury is one which no reasonable man could have given. If the verdict had turned merely upon the appreciation of the oral evidence capable of being viewed either way, but as to which we were inclined to take a different view from that of the jury, it is clear that we could not have interfered."

These words are a mere reference to the law which governs the hearing of all appeals upon questions of fact. In taking up the attitude recommended by the learned Judge towards the verdict of the jury the Court is doing no more than obeying the directions contained in the statute itself to exercise the power which it could exercise on appeal.

In *Emperor v. Zahir Haider Bilgrami* (9) the same learned Judge dealing with the case in which the Bench came to the conclusion that the inference drawn by the jury was manifestly inconsistent with the documentary evidence and the conduct of the parties stated his

(5) [1909] 2 I.C. 593.

(6) A.I.R. 1925 Lah. 401=88 I.C. 857=26 Cr. L.J. 1241=6 Lah. 98.

(7) A.I.R. 1928 Cal. 732=111 I. C. 327=29 Cr. L.J. 823=55 Cal. 879.

(8) A. I. R. 1923 Pat. 474=86 I. C. 712=26 Cr. L. J. 852.

(9) A. I. R. 1926 Pat. 566=97 I. C. 17=27 Cr. L. J. 1041.

opinion of the law in words which I think went beyond the necessities of the case before him and with which I am unable entirely to agree. He said:

"It is true that where one of two inferences is possible upon the evidence the Court of reference will not interfere with the finding of the jury even though the Court is of opinion that it would have drawn the other inference if it had been a Court of appeal."

As I have said this was a case in which in fact the Court did interfere with the verdict and there is no record that any case, save that decided by the same Judge in *Emperor v. Ali Haider* (8), was cited to the Court. In my opinion the limitations upon a Court of appeal dealing with a judgment of fact by a lower tribunal are as severe in the case of an appeal as they are in the case of a reference and the learned Judge was not correct in suggesting that a Court of appeal would have been justified in reversing a finding of fact with greater freedom than that to be exercised by a Court of reference. The more correct point of view was expressed by Richardson, J., in *Emperor v. Jamaldi Fakir* (10) (at 539 of 28 C. W. N.). He was drawing a distinction between Ss. 423 and 307 and he said:

"It may well be that if he had accepted the verdict and the five accused had appealed, the appeal, regard being had to S. 423 (2) of the Code, would have been unsuccessful. But the learned Judge has not accepted the verdict of the jury. On the contrary his opinion is that the verdict is erroneous and should be set aside, and the matter comes before us not under S. 423 but under S. 307 of the Code. Now S. 307 lays down that, in dealing with a case submitted thereunder the High Court 'may exercise any of the powers which it may exercise on an appeal, and that 'subject thereto, it shall, after considering the entire evidence, and after giving due weight to the opinions of the Sessions Judge and of the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed before it.' Our duty accordingly is to consider the evidence on the record as it stands to weigh the respective opinions of the Sessions Judge and the jury, and then to form our own conclusions. It still remains that the verdict of the jury is first in the field and the Code, S. 299, makes it primarily the function of the jury 'to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned' and 'to decide all questions which according to law are to be deemed questions of fact.' On general principles therefore it appears to me that when the process which S. 307 directs has been carried out, and the opinions of the Judge and jury have been measured, in the result the verdict of the jury should stand unless the evidence and the opi-

nion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed."

A similar decision, but not in my opinion so clearly expressed is found in *Emperor v. Shera* (11). The only cases of which I am aware, which are definite decisions that the verdict of the jury cannot be disturbed unless it is perverse or clearly and manifestly wrong are the two next mentioned. Firstly *Emperor v. Panna Lal* (12) in which a jury had acquitted a man of attempted rape. Cases of this kind have always to be scrutinized with great care and the evidence regarded with suspicion but the facts as reported in that case show that the jury were well within their function in disbelieving the evidence for the prosecution. In my opinion the learned Judges were really influenced by the facts of the case. Moreover there is a passage in the judgment which in my opinion, clearly shows that the Judges were not presented with the correct argument. They said:

"Under the provisions of S. 307 a High Court has very full powers to reopen all matters in connexion with a verdict of acquittal of a jury with which the Sessions Judge has disagreed and which he has referred to the Court under the provisions of that section. But it does not follow that because powers have been given to the Court, the Court should feel justified in using those powers to the full. There have been two schools of thought, both before and after the amendment of the law which took place in 1896, as to the correct legal principles to be adopted in such circumstances. One school has considered that a High Court should not interfere with a verdict unless it is perverse and clearly and manifestly wrong. The other school has held the opinion that in such cases the High Court should reopen the matter ab initio and apply an independent mind to the evidence and form its own conclusions thereon. It cannot be suggested that the view taken by the first school is an improper one. The High Court may exercise on appeal, but it is perfectly within its rights in considering that in cases such as these interference should only be permitted in cases of perversity or clear and manifest error and that where a jury has arrived at a verdict which is not perverse and not clearly and manifestly wrong, such verdict should not be interfered with although it is perfectly possible to form a not unreasonable opinion contrary to the opinion taken by the jury."

It is not correct to say that: "the other school has held the opinion that in such cases the High Court should re-open the matter ab initio."

(11) A. I. R. 1928 All. 207=108 I. C. 225=29 Cr. L. J. 353=50 All. 625 (F. B.).

(12) A. I. R. 1924 All. 411=81 I. C. 629=25 Cr. L. J. 981=46 All. 265.

(10) A. I. R. 1924 Cal. 701=81 I. C. 712=25 Cr. L. J. 1000=51 Cal. 160.

Such a suggestion would be directly opposed to the principle governing the hearing of all appeals on questions of fact. Even when an appeal is given on a question of fact the appeal is not a re-opening of the matter *ab initio* and the conditions under which an Indian appellate Court has to deal with a case should make this clear. Not only has the appellate Court not seen or heard the witnesses but only a summary version of their evidence in a foreign language is available. The proceeding is an appeal and not a re-hearing. If the Court had understood this it would not, I think, have been led to its conclusion in favour of the equally erroneous alternative view. Moreover the learned Judges support their opinion by reference to a judgment delivered in 1875 by West, J., in which an analogy has been drawn with the English law as to jury trials. It has often been pointed out that there is no such analogy and the powers of the jury are subjected to the very definite limitations laid down in the Criminal Procedure Code: see for example *Romesh Chandra Banerjee v. Emperor* (13). A verdict of acquittal by an English jury is (subject to the peculiar provisions of S. 3 of the English Criminal Appeal Act 7, Ed. 7, C. 23) absolutely inviolate and a verdict of conviction, provided that there has been no misdirection, is almost equally so, whereas the Indian Code of Criminal Procedure provides several instances in which the verdict of the jury on issues of fact may be reviewed. The English jury is a product of the Common law; and an Indian jury is a statutory creation upon whose powers very definite and statutory limitations are imposed and the verdict of an Indian jury has no higher status than that conferred upon it by the statute to which it owes its own creation.

The second case is that of *In re Veerappa Goundan* (14) and, like the case last cited, is one in which the two equally erroneous points of view were put before a Full Bench for a choice between them and the Court decided that, as between trying the case *de novo* as though there had been no Sessions trial at all, and refusing to set aside anything but a perverse verdict the Court

should adopt the latter course. I am unable to agree with the decision. Moreover the false analogy with the English system again seems to me to have misled the Madras Court. I would sum up my opinion of the law on this question by stating that the duty of the High Court in a reference under S. 307, Criminal P. C., is to consider the whole of the evidence and the opinions of the Sessions Judge on the one hand and of the jury on the other hand, and thereupon, as directed by the statute, to exercise all the powers of the Court of appeal, remembering that the duty of an appellate Court, where an appeal is given on questions of fact is to throw upon those who seek to disturb the verdict of the jury or other first tribunal of fact the onus of showing that that verdict is wrong. But if the party so seeking succeeds in demonstrating that the verdict is wrong the Court has full power to reverse the verdict. Moreover whatever academic and abstract view of the question of principle may be held no sane appellate Court will uphold a conviction which, after considering the evidence and opinions it feels to be wrong however difficult it may be to express that feeling in words. (After stating the facts of the case in detail and after considering the evidence, his Lordship proceeded). The accused persons have each denied all knowledge of the occurrence and have stated that they had been implicated out of grudge. The learned Sessions Judge had some ground for declining to disagree with the opinion of the jury with regard to Ismail, Didaram and Siddiq.

In the first place the evidence of all the witnesses indicates that they took no actual part in the assault. In the second place Didaram is an old man and suffers from cataract. Ismail seems to suffer from some affection of the heart and there is some reason for thinking that he is incapable of great physical effort and Siddiq is lame and one of his arms is also affected. The evidence of Budhan is that these three persons had only small painas in their hands. But as to the accused Rafi, Nazia and Walayat the opinion of the jury is clearly erroneous and I agree with the opinion of the learned Sessions Judge. I would therefore convict these three persons under S. 302, I. P. C. With regard to Walayat, who began the assault upon the deceased with

(13) A. I. R. 1914 Cal. 456=23 I. C. 985=15 Cr. L. J. 385=41 Cal. 350.

(14) A. I. R. 1928 Mad. 1186=114 I. C. 353=51 Mad. 956. (F. B.).

a lathi blow, the Judge says in his letter of reference that, had the jury convicted him of causing grievous hurt, he would not have thought it necessary to express disagreement.

As I have said, in my opinion he should be convicted of murder having regard to the fact that he accompanied and assisted the two other men in dealing the fatal blow, and moreover the blow delivered by him as his share was of a serious nature. That he was actively contributing to the murder I have no doubt. Nevertheless I think his is a case which may satisfactorily be met with the lesser sentence of transportation for life. I see no extenuating circumstances whatever in the case of Rafi Mian and Nasir Mian and I would sentence them to be hanged by the neck till they are dead.

Dhavle, J.—I agree.

K.N./R.K. Order accordingly.

A. I. R. 1932 Patna 251

MACPHERSON AND DHAVLE, JJ.

Hirday Narayan Singh—Appellant.

v.

Rao Maheshwari Prasad Singh—Respondent.

Appeal No. 136 of 1930, Decided on 4th August 1931, against original order of Sub-Judge, Monghyr, D/- 10th March 1930.

Limitation Act (1908), Art. 182 — Execution of decree — Period of limitation runs from final decree.

Where an appeal to the High Court from dismissal of suit is dismissed, and his appeal to the Privy Council is also dismissed for nonprosecution, the period of limitation under Art. 182, runs not from the dismissal of the appeal to the Privy Council for want of prosecution but from the order of the High Court confirming the decree which was "the final order of the appellate Court" and which did not become merged in the order of the Privy Council. The order dismissing the appeal for want of prosecution does not deal judicially with the matter of the suit and can in no sense be regarded as an order adopting or confirming the decision appealed from, and the appellant is in the same position as if he has not appealed at all: *A. I. R. 1914 P. C. 66*; *A. I. R. 1914 P. C. 65* and *A. I. R. 1922 P. C. 187, Ref.*; *A. I. R. 1921 Pat. 6, Diss. from.* [P 252 C 1]

A. P. Upadhaya and *K. P. Upadhaya*—for Appellant.

Jagannath Prasad—for Respondent.

Macpherson, J.—This appeal is preferred by the judgment-debtor whose objection that the application in execution was barred by limitation when it was filed on 21st June 1929, has been rejected.

The appellant's suit No. 110 of 1918 was dismissed in 1920, his appeal to the High Court on 17th April 1923, and his appeal to the Privy Council on 2nd December 1926, the last mentioned for nonprosecution. Thus the application in execution was within time if time runs from the dismissal of the Privy Council appeal as the decree-holder considered but not if it runs from the dismissal of his appeal in the High Court, as the judgment-debtor contended in his objection. The executing Court sustained the contention of the decree-holder that the starting point of limitation is the date of dismissal of the Privy Council appeal. The learned Subordinate Judge has dealt superficially with the matter. After mentioning that Art. 182, Lim. Act, 1908, lays down that when there has been an appeal, limitation will run from the date of the withdrawal of the appeal, he proceeded to hold that there was

"not much difference in withdrawing an appeal and dismissing it for default,"

citing in support of his view the decision of this Court in *Raghu Prasad Singh v. Jadunandan Prasad Singh* (1). He then set out that the rulings of the Judicial Committee in *Sachindra Nath Ray v. Maharaj Bahadur Singh* (2), and *Abdul Majid v. Jawahir Lal* (3) relied upon by the objector did not avail him as they took no account of Art. 182, Lim. Act, 1908. Mr. Jagannath Prasad on behalf of the respondent admits that he cannot support the view of the lower Court and in particular the dictum that withdrawal of an appeal and dismissal of it for default are practically the same for the purposes of Art. 182 (2), Lim. Act, 1908. At first the learned advocate was inclined to support the decision on a different ground, that is to say, in reliance upon the words "the date of the final decree or order of the appellate Court" in the article mentioned. But eventually he found himself so pressed by the Privy Council decisions cited and the decision in *Batuk Nath v. Muni Dei* (4) as to admit that the appeal must succeed. The learned advocate for the appellant made

(1) *A. I. R. 1921 Pat. 6=59 I. C. 896=6 Pat. L. J. 27.*

(2) *A. I. R. 1922 P. C. 187=74 I. C. 660=48 I. A. 335=49 Cal. 203 (P.C.).*

(3) *A. I. R. 1914 P. C. 66=23 I. C. 649=36 All. 350 (P.C.).*

(4) *A. I. R. 1914 P. C. 65=23 I. C. 644=41 I. A. 104=36 All. 284 (P.C.).*

a careful examination of the three decisions of the Judicial Committee and the decision of this Court along with the relevant rules of the Judicial Committee as they at present stand (Bentwich's Privy Council Practice, 1925) and as they stood in 1908.

The earliest decision is *Abdul Majid v. Jawahir Lal* (3). In that case an appeal against a preliminary decree in a mortgage suit had been dismissed by the High Court in 1893 and the consequent appeal to the Privy Council was admitted but was dismissed for want of prosecution on 13th May 1901. The Courts in India held that the period of limitation to make absolute the decree for sale was 12 years under Art. 180, Lim. Act, 1877; but the Judicial Committee held that the period of limitation was three years under Art. 179 and that limitation ran not from the dismissal of the appeal for want of prosecution but from the order of the High Court confirming the decree which was "the final order of the appellate Court" and which did not become merged in the order of the Privy Council. Lord Moulton who delivered the judgment observed as follows;

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

In the case of *Batuk Nath v. Muni Dei* (4) their Lordships were dealing with the case where the appeal had not been admitted. Therein they held that a dismissal for want of prosecution of an appeal to the Privy Council was not the final decree of the appellate Court within the meaning of Art. 179 (2), Lim. Act, 1877, and that under that article the period of limitation in an application for execution of a decree could not be reckoned from the date of such dismissal. From the High Court decree of 12th February 1900, an appeal had been preferred by the decree-holder to His Majesty in Council which was eventually dismissed for default of prosecution on 15th December 1904. His assignee applied on 2nd October 1907, for execution of the decree. Their Lordships held that the application was barred by limitation under Art. 179, Lim. Act, 1877, as the dismissal of the

appeal to the Privy Council was not by a final order or decree of His Majesty in Council made in appeal. They pointed out that under R. 5 of the Order-in-Council of 15th June 1853, effectual steps having not been taken for the prosecution of the appeal, the appeal stood dismissed without further order, that is to say, automatically.

Rule 5 of 1853 corresponds to R. 34, Judicial Committee Rules, 1925. In these rules, there are separate rules for withdrawal of appeals and for nonprosecution of appeals, Rr. 32 and 33 referring to the former and Rr. 34 to 37 to the latter. R. 34 which corresponds to R. 5 of the rules of 1853, deals with the case where no steps in prosecution of the appeal have been taken within a specified period from the date of the arrival of the record in England. *Batuk Nath v. Muni Dei* (4) was a case governed by that rule. Rr. 35 and 36 deal with dismissal for nonprosecution after appearance but the former is concerned with such dismissal before and the latter with such dismissal after lodgment of the petition of appeal. In the present instance the dismissal was under R. 36. Accordingly summons must have been issued on the appellant and a copy of it on the respondent. The rule concludes:

"The Judicial Committee may after considering the matter of the said summons, recommend to His Majesty the dismissal of the appeal for nonprosecution, or give such other directions therein as the justice of the case may require."

The respondents appeared and asked for and received costs. The new Code of Civil Procedure which came into operation on 21st March 1908, made changes in respect of mortgage suits. The law of limitation was amended by the new Limitation Act of 1908 which came into force on 1st January 1909. Among other changes Art. 179 became Art. 182 with the addition of the words "or the withdrawal of the appeal" to the words "the date of the final decree or order of the appellate Court" as the starting point of limitation, while Art. 180 became Art. 183. In the third case which is *Sachindra Nath Roy v. Maharaj Bahadur Singh* (2) and which was decided in 1921 their Lordships of the Judicial Committee held that there was no provision in the Limitation Act, 1908 so retrospective in its effect as to revive and make effective a judgment or decree which before that date had

become unenforceable by lapse of time as the High Court decree had become. In the case before their Lordships the appellants had mortgaged immovable property to the respondents who deposited the deeds by way of equitable mortgage with a firm. The appellants paid off the mortgage and the respondents executed an agreement to indemnify them against all claims in respect of the deeds. In 1905 the firm in appeal in the High Court obtained a decree against the appellants and others for the sale of the property in default of payment of the amount due upon the equitable mortgage. The appellants appealed to the Privy Council but on 2nd February 1910, before the hearing discharged the claim upon the equitable mortgage and ceased to prosecute the appeal which on 16th April 1910, was dismissed for want of prosecution. On 9th September 1912 the appellants sued the respondents to recover the sum which they had paid to discharge the equitable mortgage. Their Lordships held that at the date of the payment a suit by the respondents upon the decree of 26th August 1905, would have been barred under Art. 179, Lim. Act, 1877, since time ran from the date of the decree and not from the dismissal of the appeal and referred with approval to the decisions in *Abdul Majid v. Jawahir Lal* (3) and *Batuk Nath v. Muni Dei* (4).

At the date of this decision the Judicial Committee Rules of 1908 were in force and they are and in particular R. 36 is, substantially the same as the present rules which were in force in 1926. It would seem therefore that the view of the Judicial Committee is that not only under R. 34 but also under R. 36 the dismissal for nonprosecution of an appeal to the Privy Council even after admission and appearance of the respondents does not constitute a final decree or order of the appellate Court within the meaning of Art. 182 (2). In *Ragho Prasad Singh v. Jadunandan Prasad Singh* (1) it was indeed held in respect of an appeal in the High Court that under Art. 182 (2) the period of limitation runs from the date when the appeal in the High Court is finally disposed of, and hence if the appeal is dismissed for "want of prosecution" as when the appellant failed to deposit the

printing costs, the date of dismissal of the appeal gives the starting point of limitation. The learned Judges explained and distinguished the decisions in *Abdul Majid v. Jawahir Lal* (3) and *Batuk Nath v. Muni Dei* (4). It was suggested that the appeal to the Privy Council in *Abdul Majid v. Jawahir Lal* (3) had been dismissed automatically so that the dismissal could not be an order of His Majesty in Council within the meaning of Art. 180 (now 183), Lim. Act. Now in the first place it is not clear that the dismissal referred to in *Abdul Majid v. Jawahir Lal* (3) was automatic. It would have been so under the old R. 5 of 1853 corresponding to the present R. 34. But in the placitum it is represented as having been "admitted" so that the dismissal could not have been under R. 5. Again the appeal in the High Court was dismissed on 8th April 1893, and the appeal to the Privy Council was dismissed over eight years later, a fact which is inconsistent with action under R. 5. To my mind the dismissal was not under R. 5 and was no more automatic than in *Sachindra Nath Roy v. Maharaj Bahadur Singh* (2) or in the present instance. It falls to be observed that the Division Bench of this Court had not before them the decision in *Surendra Nath Roy v. Maharaj Bahadur Singh* (2) which was only delivered in the following year. Furthermore, the learned Judges go on to draw a distinction between the two decisions of the Judicial Committee and the case before them where the dismissal had been in the High Court. In my opinion we are not here bound by that decision of this Court. For the reasons above given I consider that the application in execution is barred by limitation. I would therefore decree the appeal and sustaining the objection dismiss the application in execution with costs in this Court and in the Court below.

Dhavle, J.—I agree.

K.N./R.K.

Appeal allowed.

A. I. R. 1932 Patna 253

JWALA PRASAD, AG. C. J. AND

JAMES, J.

Braham Kishun Narain Deo—Applt.

v.

Harihar Munder—Respondent.

Appeal No. 50 of 1931, Decided on 16th July 1931.

Limitation Act (1908), Art. 182 (7)—Instalment decrees — Decree leaving option to decree-holder to apply for execution on happening of any default—Limitation runs in respect of each instalment separately from date of respective default.

Unless a decree clearly leaves the decree-holder no option on the happening of the default but to execute the decree once for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default; and limitation will run only against him in respect of each instalment separately from the time when each such instalment may become due and payable: 4 Pat. L. J. 365, *Foll.* [P 255 C 1]

S. C. Mozumdar—for Appellant.

S. N. Sahay and *R. Misra*—for Respondent.

James, J.—The appellant in this case held a decree by which the judgment-debtor was to pay in annual instalments, the first payable in Baisakh, 1331, and the last in Baisakh, 1336. The judgment-debtor paid his instalment of 1331 and he made a subsequent payment which was credited by the decree holder to the instalment due in 1332, although it was paid nearly a year later. No more instalments were paid, and on 22nd May 1929, the decree-holder put his decree into execution by a petition, in continuation of which a second petition was filed on 4th September 1929. The judgment-debtor took the defence that execution was barred by limitation. He also alleged that he had satisfied the decree; but the Courts have found that he made only two payments, the first in 1331 and the second in 1333. According to the decree holder, the payment which was made in 1333 on 14th May 1926, was for the kist which had fallen due in Baisakh of 1332. The receipt, which was filed by the judgment-debtor, purports to be for the third instalment, but as the learned Munsif observed, there had been an erasure and alteration at this place, and the word "soem" had been substituted for "doem" meaning the second instalment. But whether this payment was for the second instalment or for the third, the judgment-debtor had committed default in omitting to pay the second instalment as it fell due. By the terms of the decree the decree-holder was entitled in the event of default to treat the whole debt as immediately payable; and it was argued that when there was a default in 1332 the whole debt became thus immediately payable, and a cause of action

was given to the decree-holder which caused limitation to run, so that unless execution was levied within three years from the date of that default it would be barred. The Munsif held that when the decree-holder accepted payment of this kist he waived the default and that his right to take out execution began with the default in payment of the kist of 1333 on 27th May 1926. He therefore held that proceedings in execution were not barred by limitation. On appeal the Subordinate Judge held that there had been a default in payment of the kist of 1332, and that limitation would begin to run from that date whether the payment for that kist was subsequently accepted or not, since the mere acceptance of payment of an overdue instalment would not amount to a waiver of the right to execute the decree for the entire sum due. He treated the questioned receipt as having been given for the instalment due in 1333, remarking that it palpably showed on its face that the payment was in respect of the third instalment. The appeal was accordingly allowed and the execution case dismissed. The decree-holder appeals from that decision.

Mr. Mazumdar on behalf of the appellant argues that although the decree-holder may have had a right to execute his decree for the whole amount when the judgment-debtor defaulted in payment of instalment of 1332, he was not obliged to exercise that right unless he chose, and the option of exercising it would accrue to him at every subsequent default of the judgment-debtor. He might if he had chosen have executed the decree against the judgment-debtor in 1332 merely for the instalment which had fallen due; and although after he had accepted payment of the instalment he could no longer do that he was still entitled to execute his decree whenever default might occur, either for the instalments that had not been paid, or, if he chose to exercise the option given to him by the decree, for the whole amount remaining due under it. Mr. Mazumdar also challenges the finding of the learned Subordinate Judge that the receipt (Ex. 1-A) was granted for the third instalment, on the ground that he has not considered the finding of the learned Munsif that there has been an alteration on the face of this document, contending that the receipt on the face of it shows that it

was originally issued for the second instalment.

On the question of whether the default, which gave rise to the present execution proceedings, occurred in 1333 or in an earlier year, Mr S. N. Sahay argues that the expression of opinion of the learned Subordinate Judge should be taken as a finding of fact which is binding on this Court in second appeal. The learned Subordinate Judge has remarked that the receipt palpably shows on its face that payment was in respect of the third instalment. This of course cannot be denied. But he goes on to say that if there had been any stipulation that all previous defaults would be ignored, the word "doem" should appear in the receipt, ignoring the fact which had been pointed out by the learned Munsif that the word "doem" does appear in the receipt, although by what appears to be forgery the word "soem" has been written over it. It appears to be clear that this receipt was originally granted for the second instalment, and that the judgment-debtor has at some subsequent time altered it, either with the idea of making it appear that he had paid both the second and the third instalments, or with the idea of establishing a ground for pleading the bar of limitation in execution proceedings. The receipt may be taken as for payment of the second kist made nearly a year late.

Mr. S. N. Sahay argues that immediately on the default occurring in 1332 the decree-holder had a right to sue for the whole debt by the terms of the decree, and that limitation should be taken to run from that time. But, as has been pointed out by this Court, unless a decree clearly leaves the decree-holder no option on the happening of the default but to execute the decree once for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default; and limitation will run only against him in respect of each instalment separately from the time when each such instalment may become due and payable: *Manindra Nath Roy v. Kanhai Ram Marwari* (1). Thus, if the instalment due for 1332 was not paid when it fell due, that instalment would have been irrecoverable if execution had been taken for it in May 1929, but the decree holder

(1) [1919] 4 Pat. L. J. 365=48 I. O. 723.

was not compelled to execute his decree for the whole amount by the mere fact that he had an option to do it if he chose. Mr. S. N. Sahay suggests that the failure to exercise this option when the decree-holder had the power of doing it took away from him the right of exercising it on any subsequent occasion, but this point also has been clearly decided against his contention by the authority of this Court for which I need only mention the decision quoted above.

The appeal must therefore be allowed with costs, and the order of the Subordinate Judge set aside and that of the Munsif restored.

Jwala Prasad, Ag. C. J.—I agree.

V.B./R.K.

Appeal allowed.

A. I. R. 1932 Patna 255

DHAVLE AND MOHAMMAD NOOR, JJ.

Nitai Dutta—Appellant.

v.

Bishun Lal Sao and another—Respondents.

Appeal No. 263 of 1930, Decided on 8th January 1932, from original order of Sub-Judge, Dhanbad, D/- 4th September 1930.

Civil P. C. (1908), O. 21, R. 90—Auction-purchaser is not necessary party—It is sufficient if notice is given to him subsequently.

It is not necessary for the applicant under O. 21, R. 90, to name the auction-purchaser as a party in the application. It is sufficient that the application is made within 30 days of the sale and notice of the application is subsequently given to the auction-purchaser; 2 Pat. 800; A. I. R. 1926 Pat. 266; 37 Bom 387 and A. I. R. 1929 All. 593, Foll.; A. I. R. 1921 Pat. 498 and 15 All. 407, not Foll.

[P 256 C 2]

S. C. Mazumdar and G. C. Das—for Appellant.

B. C. De—for Respondents.

Dhavle, J.—This is an appeal by an auction-purchaser against an order allowing an application under O. 21, R. 90, Civil P. C. The only ground on which the application under O. 21, R. 90 was resisted below and has been resisted here is that the auction-purchaser was not made a party to the proceedings within the thirty days prescribed for such applications. The sale took place on 17th March 1930, the application under O. 21, R. 90 was filed on 16th April 1930, and the auction-purchaser was added as a party on the petition of the applicant dated 24th May 1930. The lower Court accepted the contention

advanced on behalf of the applicant that it was not necessary for the applicant to add the auction-purchaser as a party, that all that is required under O. 21, R. 92, is that the Court shall not pass an order disposing of an application under O. 21, R. 90 (among others) without giving notice to the persons concerned, and that no period is fixed within which this notice is to be served. In accepting this contention the lower Court purported to follow certain decisions of this Court in which the view to the contrary taken in *Mt. Sumitra Kuer v. Damri Lall* (1) by Ross, J., was not followed. The learned advocate for the auction-purchaser appellant has contended that it is essential for an application under O. 21, R. 90, to make the auction-purchaser a party, but as was pointed out in *Mt. Bibi Zainab v. Paras Nath* (2), O. 21, R. 92, does not anywhere speak of the auction-purchaser being made a party, but only provides that no sale can be confirmed or set aside unless notice of the application has been given to all persons affected thereby, a rule which means that the Court is incompetent to make any order at all till such notice is given.

The law does require that the application under O. 21, R. 90 should be made within 30 days of the sale, but does not impose any period of limitation for the issue of notice. The same view was taken in *Iswardas Marwari v. Biseswar Lal Marwari* (3), a decision by another Bench of this Court which followed the decision from *Mt. Bibi Zainabi v. Paras Nath* (2). Both the decisions followed *Ganesh Babnaik v. Vithal Mahalya* (4), a case in which the view taken in the Allahabad High Court (regarding the decree-holder being a necessary party) in *Ali Gauhar Khan v. Bansidhar* (5) was dissented from. It has been brought to our notice by the learned advocate for the respondents that the Allahabad High Court has recently in *Dio Chand v. Sheo Prasad* (6), considered the decision from *Ali Gauhar Khan v. Bansidhar* (5) and come to the conclusion that that view or, rather the view taken in the case if fol-

lowed, *Karamat Khan v. Amir Ali* (7), is no longer good law. The learned advocate for the appellant has cited *Rameshwar Singh Bahadur v. Mangal Prosad Sahu* (8) in which it was held that an auction-purchaser is a necessary party to an appeal arising out of an application under O. 21, R. 90, his absence being considered fatal to the appeal. In my opinion this decision is of no real assistance on the present occasion.

The order to be passed by the primary Court must under O. 21, R. 92, be passed after notice to the auction-purchaser, and any appeal arising out of such an order must necessarily be heard after bringing him on the record. The learned advocate has endeavoured to distinguish the decisions from *Mt. Bibi Zainab v. Paras Nath* (2) and *Iswar Das Marwari v. Biseswar Lal Marwari* (3) on the facts. But the point is that both the decisions considered the matter generally and proceeded on the view that R. 90, or it may be R. 89, or O. 21, or R. 92 does not anywhere speak of the auction-purchaser or decree-holder being made a party. Apparently the Lahore High Court has also recently taken the view that under these rules there is no question of the decree-holder or the auction-purchaser being made a party. The decisions of this Court followed the view taken by the Bombay High Court, and I have already referred to the recent view of the Allahabad High Court. On principle and authority alike, it seems to me clear that the lower Court was right in holding that it was not necessary for the applicant under O. 21, R. 90, to name the auction-purchaser as a party in the application, and that it was sufficient that the application was made within 30 days of the sale and notice of the application was subsequently given to the auction-purchaser. I would therefore dismiss the appeal with costs.

Mohammad Noor, J.—I agree.

P.N./R.K.

Appeal dismissed.

(7) [1891] A. W. N. 121.

(8) A. I. R. 1930 Pat. 318 = 125 I. C. 570 = 9 Pat. 310.

(1) A. I. R. 1921 Pat. 498 = 62 I. C. 61.

(2) A. I. R. 1924 Pat. 37 = 75 I. C. 430 = 2 Pat. 800.

(3) A. I. R. 1926 Pat. 266 = 94 I. C. 31.

(4) [1913] 37 Bom. 387 = 19 I. C. 475.

(5) [1893] 15 All. 407 = (1893) A. W. N. 173.

(6) A. I. R. 1929 All. 593 = 119 I. C. 103 = 51 All. 910.

A. I. R. 1932 Patna 257

JWALA PRASAD, AG. C. J. AND
JAMES, J.

Goberdhan Gorain—Appellant.

v.

Shibakali and others—Respondents.

Letters Patent Appeal No. 14 of 1931,
Decided on 21st July 1931.

(a) **Chota Nagpur Tenancy Act (6 of 1908), S. 139 Cls. (4) (8)—Chap. 4 does not provide for acquisition of occupancy rights by under-tenants — Settled raiyats acquiring homestead land from other raiyats—They cannot be ejected from homestead land through civil Court.**

Chapter 4 does not provide at all for acquisition of occupancy rights by under-tenants, nor does it say that an under-tenant who holds other lands as occupancy raiyat would acquire the status of occupancy raiyat in respect of the former class of land. [P 258 C 1,2]

Defendants who had held certain land as settled raiyats in a village acquired some udbastu or homestead land from the plaintiff who was also a raiyat in the village. In respect of the latter land they were under-tenants and could not acquire the status of raiyat, because they did not and do not hold the land either immediately under a proprietor or immediately under a tenure-holder, which is essential under Cl. (2), S. 6 of the Act. Hence a suit brought by the plaintiff for ejectment of the defendants from the homestead land, which is not agricultural land is not barred by S. 139 (4), nor is it barred by Cl. 8 of that section as in order to bar a suit or an application under that clause, there must have been provision made and jurisdiction conferred by the Act on the Deputy Commissioner to entertain such a suit or application. Even if the defendants have acquired occupancy right there is no provision for a suit to eject them from their homestead land which they hold separate from their agricultural holding. Therefore the jurisdiction of the civil Court is not barred. [P 259 C 2]

(b) **Chota Nagpur Tenancy Act (6 of 1908), S. 46—Landlord cannot take advantage of his own wrong to eject tenants from homestead given under invalid lease.**

Landlord sought to eject the tenants from the homestead land on the ground that the lease given by him to the tenants was invalid from its inception as being for an indefinite period, that is, exceeding five years. The tenants had been admittedly holding the land for over ten years. The lease was not binding on the landlord :

Held : that although the lease was invalid the landlord who brought the tenants upon the land and took nazrana and allowed them to build the house and to remain in possession for such a long period, could not be permitted to take advantage of his own wrong and to eject the tenants. [P 259 C 2]

A. K. Roy—for Appellant.

B. B. Mukherjee and S. P. Asthana—for Respondents.

Jwala Prasad, Ag. C. J.—The plaintiff is the appellant. He is a settled raiyat having occupancy holding in vil-

lage Chakulia and he has also homestead land entered in the survey Record-of-Rights as udbastu land about 1 bigha 9 kathas in plot No. 740. The defendants father Fakir Rai was the Station Master at Chakulia. In 1318 Fakir Rai took settlement of about 13 bighas of land from the proprietor for cultivation. Later on (the exact date is not known) he took a verbal settlement of 15 kathas of land from the plaintiff out of the udbastu in plot No. 740. He erected buildings thereon and died 10 or 12 years ago. The defendants, his heirs, are now in possession of both the raiyati land 13 bighas of which their father took settlement from the landlord and the afore-said udbastu land 15 kathas of which their father took a verbal settlement from the plaintiff. The plaintiff served the defendants with notice to quit, treating them as tenants-at-will or yearly tenants liable to be ejected by service of notice, and the notice not having been complied with, the plaintiff instituted the present suit in 1926 for ejectment. The defendants resisted the suit claiming that they have acquired occupancy right in the land in dispute and that the jurisdiction of the civil Court to try the suit is barred by the Chota Nagpur Tenancy Act (Act 6 of 1908). The Munsif, who tried the suit, upheld the contention of the defendants, holding that the defendants had occupancy right and were not liable to be ejected and that the Court had no jurisdiction to try the suit.

The plaintiff appealed and before the lower appellate Court it was conceded by the parties that the Court had jurisdiction to try the suit as the disputed land was the homestead land and not agricultural. But the Court below agreed with the Munsif that the defendants had acquired occupancy right and dismissed the appeal. The plaintiff came to this Court in second appeal, which was disposed of by a single Judge of this Court who by his decision, dated 5th February 1931, dismissed the plaintiff's appeal. The plaintiff has therefore filed this Letters Patent appeal. The learned Judge of this Court did not decide the question of whether the defendants had or had not acquired occupancy right in the land. He dismissed the appeal upon the ground that the civil Court had no jurisdiction to try the suit. The case has been argued at great length and numerous authorities

have been cited. After a careful consideration of those authorities it seems to me that none of them exactly applies to the facts of the present case. The suit is said to have been barred by S. 139, read with S. 139-A, Chota Nagpur Tenancy Act. S. 139 gives a list of suits and applications which it says:

"shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other Court, except as otherwise provided in this Act."

In the list of such suits and applications are those as mentioned in Cl. (4), viz.:

"all suits and applications (under this Act) to eject any tenant of agricultural land or to cancel any lease of agricultural land."

Another clause which is said to bear upon this point is Cl. (8):

"All suits and applications in respect of which jurisdiction is conferred by this Act on the Deputy Commissioner."

Clause (4) referred to above applies only to "agricultural land." Admittedly the land in question is not agricultural. It is udbastu or homestead land as described in the khatian. As the plaintiff is a raiyat of the village, the incidents of his homestead land, which is not part of his raiyati land, are the same as those of his agricultural holding. The defendants' father took settlement of 15 kathas out of udbastu land subsequent to his having taken settlement of 13 bighas of land from the landlord for cultivation. The defendants' father being a raiyat within the meaning of S. 6, Chota Nagpur Tenancy Act, having acquired 13 bighas of land from the proprietor for the purpose of cultivation became a settled raiyat after the expiry of twelve years in 1924 in respect of those lands, and in respect of 15 kathas in dispute, part of the udbastu land of the plaintiff, the defendants were under-tenants and could not acquire the status of raiyat, because they did not and do not hold the land either immediately under a proprietor or immediately under a tenure-holder, which is essential under Cl. (2), S. 6 of the Act. Therefore they could not acquire occupancy right in respect of the 15 kathas of the udbastu land in question. Occupancy right is acquired by a raiyat, which the defendants were not, by the modes under Ch. 4, Ss. 16 to 20. That chapter does not provide at all for acquisition of occupancy right by under-tenants, nor does it say that an

under-tenant who holds other lands as occupancy raiyat would acquire the status of occupancy raiyat in respect of the former class of land.

No doubt the defendants are tenants of the land in question and as such they would come under S. 4; but as they are not tenants of agricultural land, Cl. (4), S. 139, would not apply nor would it bar the suit to eject them. Reliance is placed upon S. 78 of the Act, and it is contended that, although they are under-tenants or under-raiyats in respect of the udbastu land in dispute, they acquired the status of "raiyat" inasmuch as they hold other lands in the village as raiyats upon settlement by the landlord. S. 78 reads as follows:

"When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

The first condition for applying the section is that the homestead land should not be part of the holding of a raiyat. In this case the defendants' udbastu land is not part of their agricultural holding of 13 bighas. Therefore the first condition is satisfied. The section does not say that he will acquire occupancy right or he will become a raiyat or an occupancy raiyat in respect thereof, but that the incidents of his tenancy of the homestead land shall be regulated by the provisions of the Act applicable to agricultural holdings. We must now come back to Ch. 4. As already observed, Ss. 16 to 20 refer to the circumstances under which a raiyat acquires right of occupancy. Ss. 21 to 24 come under the heading "incidents of occupancy right" and they deal with the incidents of such right and therefore an under-raiyat having homestead land will not become a raiyat or occupancy raiyat by reason of his having other land, but the incidents of his homestead land will be the same as those of the land of which he is a raiyat or occupancy raiyat. Those incidents, briefly speaking, are that he shall use the land in the manner authorized by local custom or usage, and not in a manner materially to impair the value of the land or render it unfit for the purpose of his tenancy and that he shall not be ejected by his landlord except in execution of a decree for ejectment passed upon the ground that he has used the land in a manner not authorized by

the preceding S. 61 or that he has broken a condition on breach of which he is liable under the terms of the contract between himself and his landlord to be ejected. I need not refer to the other incidents, except that there are no incidents or right of transfer conferred upon an occupancy-raiyat by the Act. Therefore he cannot transfer it without the permission of the landlord, except where there is a custom recognizing such transfer. The plaintiff in this case gave a verbal lease to the defendants' father without fixing any term. S. 46 says:

"(1) No transfer by a raiyat of his right in his holding or any portion thereof, (a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, shall be valid to any extent."

The plaintiff gave a lease to the defendants' father without specifying any term. Such a lease is either a permanent lease or is to last during the lifetime of the lessee. In any case it is a lease which either exceeds or might possibly exceed five years and, as such, it is invalid. Cl. (4) of the section provides for an application by a raiyat to the Deputy Commissioner for being put into possession of his holding or a portion thereof within three years after the expiration of the period for which the raiyat has transferred his right in his holding or any portion thereof. This is the only clause which provides for a remedy to eject an under-raiyat. This clause has no application to the present case, because it contemplates a case where the settlement is for a definite period on the expiration of which the raiyat may obtain possession of the holding through the Deputy Commissioner if he makes his application within three years. Here there was no definite term fixed and therefore this clause has no application. There is no other provision in the Act for suits and applications to eject an under-raiyat who is in possession of the property under a lease exceeding five years or under a lease for any indefinite term, or under a permanent lease. Therefore S. 139, Cl. (8), would not bar the suit, because in order to bar a suit or an application there must have been provision made and jurisdiction conferred by the Act on the Deputy Commissioner to entertain such a suit or application. Even if the defendants have acquired occupancy right there is no provision for a suit to eject them

from their homestead land which they hold separate from their agricultural holding. Therefore the jurisdiction of the civil Court is not barred.

The question then is can the defendants be ejected? It has been shown above that the incidents of the homestead land in suit will be the same as those of the agricultural holding of 13 bighas in which the defendants have acquired the right of occupancy and the defendants can therefore be ejected only upon the grounds mentioned in S. 22 of the Act for having used the land comprised in the holding in a manner which is not authorized by S. 21, or having broken a condition on breach of which they are liable to be ejected. These are not the grounds upon which the plaintiff seeks to eject them. The ground upon which ejectment is sought is that the lease given by the plaintiff to the defendants was invalid from its inception as being for an indefinite period, that is, exceeding five years. The defendants have, according to the finding of the Court below, been holding the land for about 16 years and according to the admission of the plaintiff for over 10 years. No doubt, under Cl. (2), S. 46, the lease is not binding upon the landlord; but although the lease is invalid, the plaintiff who brought the defendants upon the lands and took nazrana and allowed them to build the house and to remain in possession for such a long period, cannot be permitted to take advantage of his own wrong and to eject the defendants. Therefore the plaintiff is not entitled to eject the defendants and the suit has been rightly dismissed. The appeal is accordingly dismissed with costs.

JAMES J.—I agree.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1932 Patna 259

COURTNEY-TERRELL, C. J. AND KULWANT SAHAY, J.

Lachmi Lal and others—Appellants.
v.

Ganesh Chamar—Respondent.

Letters Patent Appeal No. 67 of 1931,
Decided on 5th April 1932.

Bengal Tenancy Act (1885), S. 188—After determination of tenancy by all cosharers, some of them can sue tenants for ejectment—S. 188 does not apply to such suits.

Section 188 has no application to a suit by some of the cosharers for ejectment inasmuch as such a suit is not a thing which the landlords

are required or authorized to do under the Bengal Tenancy Act. All that the Act requires is that under S. 49 all the landlords should join in determining the tenancy. After the tenancy is once determined the action which the landlords take in ejecting the defendants and bringing a suit for the purpose is not a thing which is required or authorized to be done by the Bengal Tenancy Act. The suit therefore by some of the landlords cannot fail on the ground that one of them had accepted the tenants as his tenants. After determination of the tenancy on expiry of the term of the notice the position of the under-tenants becomes that of trespassers. Some of the cosharer landlords can institute a suit for possession in respect of their share of the land either jointly with the other cosharers or separately. Where there has been no separation of the land the only claim that the cosharers can make is to obtain possession in respect of their share jointly with the other cosharers as defendants. [P 260 C 2, P 261 C 1]

D. N. Verma & H. Kumar—for Appls.
C. P. Sinha—for Respondents.

Kulwant Sahay, J.—The plaintiffs-appellants and their cosharer one Jagdeo Lal held certain tenancies in two villages Lokpur and Ekil. The defendants were under-raiyats under the plaintiffs and their cosharer in respect of these two holdings. The entire body of landlords including Jagdeo Lal gave notice to the defendants under S. 49, Ben. Ten. Act, requiring them to quit the lands on the expiration of the term of the notice. After the term of the notice had expired it appears that Jagdeo Lal received certain rents from the defendants. He received rent in respect of his 8 annas share of the holding in Mauza Lokpur and he received the entire rent in respect of the 16 annas share of the holding in Mauza Ekil. On 16th September the present suit for ejectment of the defendants was instituted by the present appellants as well as by Jagdeo Lal as plaintiffs. The defence of the defendants was that they were not under-raiyats but raiyats and that the status of the plaintiffs was that of tenure-holders. The Munsif decreed the suit on a finding that the defendants were under-raiyats under the plaintiffs. There was an appeal by the defendants to the Subordinate Judge. During the pendency of the appeal Jagdeo Lal entered into a compromise with the defendants and accepted the rent. Upon this compromise the Subordinate Judge held that the suit was no longer maintainable inasmuch as the entire body of landlords were not seeking relief against the tenants and he accordingly dismissed the

suit. On second appeal to this Court this judgment of the Subordinate Judge was set aside and the case remanded to him for a finding as regards the genuineness or otherwise of the receipts alleged to have been granted by Jagdeo Lal and for disposal of the suit according to law.

After remand the Subordinate Judge found that the receipts produced by the defendants in respect of the payment of rent to Jagdeo Lal were genuine and he gave a decree to the other plaintiffs, namely, the present appellants, for partial ejectment of the defendants in respect of their shares in the holding. The defendants preferred a second appeal to this Court which was heard by a single Judge and the learned Judge allowed the appeal on a finding that having regard to the fact that Jagdeo Lal had accepted rent before the institution of the suit therefore at the time of the institution of the suit there was no subsisting cause of action in favour of Jagdeo Lal, one of the plaintiffs, and that therefore the suit of the other plaintiffs also could not be entertained. The second appeal was therefore allowed and the entire suit was dismissed. The appellants have now come up in appeal under the Letters Patent and it is contended on their behalf that the fact of the receipt of rent by Jagdeo Lal after the expiry of the term of notice did not in any way entitle the defendants to hold on as tenants under the appellants. It is contended that after the expiration of the term of the notice the position of the defendants was that of trespassers and the receipt of rent by Jagdeo Lal did not restore the position which existed before the expiry of the term of the notice. At most it amounted to a fresh settlement by Jagdeo Lal himself and it had not the effect of creating tenancy as between all the landlords and the defendants. The fact that Jagdeo Lal accepted rent to my mind did not in any way affect the other landlords who did not join Jagdeo Lal in accepting the rent. After the determination of the tenancy on expiry of the term of the notice the position of the under-tenants, namely, the defendants, became that of trespassers. The appellants as cosharer landlords could institute a suit for possession in respect of their share of the land either jointly with the tenants as representing Jagdeo Lal or

separately. As there has been no separation of the land, the only claim that the appellants can make is to obtain possession in respect of their share jointly with the defendants as representing the interest of Jagdeo Lal.

It is contended that under S. 188, Ben. Ten. Act, the suit by some of the cosharers was not maintainable. In my opinion S. 188 has no application to a suit for ejectment inasmuch as such a suit is not a thing which the landlords are required or authorized to do under the Bengal Tenancy Act. All that the Bengal Tenancy Act requires is that under S. 49 all the landlords should join in determining the tenancy. After the tenancy is once determined the action which the landlords take in ejecting the defendants and bringing a suit for the purpose is not a thing which is required or authorized to be done by the Bengal Tenancy Act. The suit therefore by some of the landlords cannot fail on the ground that one of them had accepted the tenants as his tenants. In this view of the case it is clear that the decree made by the Subordinate Judge was correct. The decision of the single Judge of this Court must therefore be set aside and the decree of the Subordinate Judge restored. The appellants are entitled to their costs here and before the single Judge.

Courtney-Terrell, C. J.—I agree.
K.N./R.K. *Appeal allowed.*

*** A. I. R. 1932 Patna 261**

WORT AND FAZL ALI, JJ.

(Sri) Chandra Chur Deo—Appellant.
v.

Mt. Shyam Kumari—Respondent.

Appeal No. 208 of 1919, Decided on 17th July 1931.

(a) Civil P. C. (1908), O. 22, R. 3—Party dying before hearing by Privy Council—Legal representative not on record—Decree is valid—Privy Council.

The fact that one of the parties in the appeal to the Privy Council had died before the appeal was heard and his legal representatives had not been brought on the record does not make the decree of the Privy Council a nullity: *A. I. R. 1920 Pat. 89, Foll; A. I. R. 1920 Pat. 672; A. I. R. 1924 Mad. 695 and A. I. R. 1927 Mad. 1088, Ref.* [P 262 C 1]

(b) Practice—Appeal—Question of facts not raised before lower Court will not be investigated by High Court.

It is not usual for the High Court to investigate an allegation of fact which either was not made before the Court of first instance or which that Court was not invited to examine. [P 263 C 1]

***(c) Civil P. C. (1908), Ss 50 and 53—Decree against dead person but valid—Decree can be executed against son of judgment-debtor under S. 53.**

The language of S. 50 does not expressly exclude those cases where the judgment-debtor dies before the passing of the decree. It only refers to the death of the judgment-debtor before the decree has been fully satisfied. Where therefore the decree is a good decree, notwithstanding the death of the judgment-debtor before the passing of the decree, the case comes well within the terms of the section, because that death takes place also before the decree has been fully satisfied, and such a decree can be executed against the property in the hands of a Hindu son who is liable under S. 53: 20 *I. C.* 506, *Dist.* [P 264 C 1]

(d) Limitation Act (1908), Arts. 182 and 183—Execution of decrees against father sought against Hindu son—Art. 120 is not applicable—Limitation Act (1908), Art. 120—Civil P. C. (1908), S. 53.

A person who has obtained a decree against the father can proceed at once against the property in the hands of his son who is liable under the Hindu law for the payment of the debt of his deceased father, and Art. 120, Lim. Act. will not apply as the proceedings under S. 47 are not a suit and also because in such cases either Art. 182 or Art. 183 will directly apply: 28 *Mad.* 466 (*F. B.*), *Dist.* [P 264 C 2]

(e) Civil P. C. (1908), O. 21, R. 15—One decree determining rights of several parties is joint decree.

The term "joint decree" is wide enough to apply to a case where the rights of several parties have been determined by one and the same decree. [P 265 C 1]

***(f) Civil P. C. (1908), O. 21, R. 15—Final Court's decree joint—R. 15 applies—Nature of lower Court's decree is immaterial.**

Whether the decrees of the lower Courts were joint or not if the last decree into which the decree of the Courts below has merged is a joint decree, and it is this final decree which is to be executed, such a case would come within O. 21, R. 15: 9 *Cal.* 482 (*P. C.*), *Ref.* [P 265 C 1]

Sambhu Saran, Baldeo Sahay and C. P. Sinha—for Appellants.

B. N. Mitter and K. P. Sukul—for Respondents.

Fazl Ali, J.—The appellants are three sons of one Babu Jagadhar Narayan Prasad and they having unsuccessfully objected to the execution of a decree for costs passed against their father and one Rai Bahadur Ram Sumeran Prasad have preferred this appeal against the decision of the Subordinate Judge of Patna. It appears that Jagadhar Prasad and Ram Sumeran Prasad instituted a suit in the Court of the Subordinate Judge at Darbhanga, against the opposite party and certain other persons in 1912. The suit was dismissed and so were the appeals which they preferred in the first instance before the High Court and then to the

Privy Council. The trial Court awarded separate costs to the various defendants and in the High Court a certain amount of costs was awarded to respondents 1 and 2 and 4 to 10. The Privy Council awarded costs only to respondents 1 and 4 on whose behalf the present execution petition has been filed. It appears from the execution petition that certain previous applications were made to the Darbhanga Court by the respondents on several dates in the year 1926 and the decree was subsequently transferred to Patna where execution was first taken out on 31st January 1927, but dismissed on 8th June 1927. Ultimately the present execution petition was filed on 22nd January 1929. A number of objections were taken by the appellants in their petition of objection which they filed on 3rd August 1929; but it appears that only ten of these objections were pressed before the Subordinate Judge of Patna who overruled all of them and directed the execution to proceed. Some of those very objections have been raised again in appeal though there are one or two objections which are urged for the first time before this Court and which do not appear to have been pressed before the Subordinate Judge.

The first and the most serious objection is that the Privy Council decree against Jagadhar Narayan Prasad is a nullity and cannot be executed against the appellants. This contention is based on the fact that Jagadhar Prasad died in the year 1920, whereas the case was decided by the Privy Council some time in the year 1922. It is argued that the Privy Council decision is a nullity, as nobody represented the interest of Jagadhar and as it was given against a dead person. This is precisely the point which arose in *Deo Nandan Prasad Singh v. Janki Singh* (1) and it was decided by a Division Bench of this Court that the fact that one of the parties in the appeal to the Privy Council had died before the appeal was heard and his legal representatives had not been brought on the record, did not make the decree of the Privy Council a nullity. This decision was followed in *Rai Bahadur Baijnath Goenka v. Ravaneshwar Prasad Singh Bahadur* (2) and the same view was taken by the Madras High Court in

Kalyani Pillai v. Thiruvankadaswami Ayyangar (3) and in *Gopalkrishnayya v. Venkataratnam* (4). All these decisions are based on the construction of S. 23 of an English statute passed in 1833 (3 and 5, William 4, C. 41), and reference is also made in the two decisions of this Court to *Flood v. Egan* (5). The report of this case is not available to us and it will therefore be unsafe to base our decision upon it. The whole question therefore turns upon the construction of S. 23 of the Statute of 1833 which runs as follows:

"And be it enacted that in any case where any order shall have been made on any such appeal as last aforesaid, the same shall have full force and effect notwithstanding the death of any of the parties interested therein: but that in all cases where any such appeal may have been withdrawn or discontinued or any compromise made in respect of the matter in dispute, before the hearing thereof then the determination of His Majesty in Council in respect of such appeal shall have no effect."

It was argued on behalf of the appellants that S. 23 must be read with S. 22, and it was clear that if so read, it could apply only to a special class of cases which were referred to in S. 22. The argument of the appellant that the present case is not covered by S. 23 seemed therefore at first sight to be unanswerable, but it was soon discovered that S. 22 has been repealed by the Statute Law Revision Act of 1861 (24 and 25 Vict., c., 101) and therefore S. 23 must now be read along with S. 21. When so read it is difficult to say that the construction put upon it by the learned Judges of this Court and of the Madras High Court in the decision to which I have referred is either unreasonable or erroneous. It is argued on behalf of the appellants that the order referred to in S. 23 must be an order passed after the appeal has been decided by the Privy Council and means an order as to the execution of the Privy Council decree, otherwise there is no meaning in the rules relating to the abatement of appeals while pending before the Privy Council and their revival at the instance of the parties affected. There is no doubt that there is something to be said in support of this argument, but at the same time having regard to the wide language used in the section, it is difficult to hold that

(1) A. I. R. 1920 Pat. 89=5 Pat. L. J. 314.

(2) A. I. R. 1920 Pat. 672=53 I. C. 212.

(3) A. I. R. 1924 Mad. 695=47 Mad. 618.

(4) A. I. R. 1927 Mad. 1088=103 I. C. 618.

(5) [1899] 20 N. S. W. R. 337.

it refers only to those cases where the parties have died after the Privy Council decree. In the latter part of the section it is provided that the order shall have no effect if the appeal has been withdrawn, discontinued or compromised before the hearing of the appeal; but it is nowhere expressly stated that the death of the party referred to in the section must have taken place after the hearing of the appeal. Besides, when the section was originally framed it was undoubtedly intended to be read with S. 22 and it is conceded that when so read it would cover a case in which a party dies before the hearing of the appeal. If therefore any narrower meaning was intended to be attached to it, when S. 22 was repealed, S. 23 would also have been suitably amended to convey that meaning. In my judgment the view taken in the two previous decisions of this Court is correct and the contention put forward by the appellants that the decree of the Privy Council is a nullity must fail.

The next contention put forward on behalf of the appellants was that under S. 50, Civil P. C., assuming that the section applied to this case, the application to execute the decree against the legal representative of the deceased judgment-debtor should have been made before the Court which passed the decree and not before the Court to which the decree was transferred for execution. This objection is based on the allegation that no application was in fact made before the Subordinate Judge of Darbhanga by whom the original suit had been tried, to proceed against the appellants as legal representatives of Jagadhar Prasad. The appellants however have not printed any document in the paper-book of this appeal which would show conclusively whether this allegation is well founded or not and it is not usual for this Court to investigate an allegation of fact which either was not made before the Court of first instance or which that Court was not invited to examine. Assuming however that the allegation is correct, the matter seems to be covered by the decision of the Privy Council in *Jang Bahadur v. Bank of Upper India* (6). It was conceded in that case that where the judgment-debtor dies and the decree holder wants to proceed against his representatives, the Court

which made the decree is by S. 50, Civil P. C., the proper Court to order that the execution shall proceed against his representatives. But it was pointed out at the same time that the getting of an order of substitution from the Court which passed the decree is only a matter of procedure and not of jurisdiction and if there is no compliance with such procedure the defect may be waived and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings. In this case although it is urged that the point was raised by the appellants in para. 9 of their objection petition, it is not difficult to see that it could have been raised in clearer language and there is no doubt that it was not urged at all before the learned Subordinate Judge, because he has formulated all the ten objections raised by the appellants before him, but he does not refer anywhere to the present objection. It is also conceded that this objection is not covered by any of the numerous grounds taken in the memorandum of appeal filed in this Court. In these circumstances the objection may well be taken to have been waived and as it was not raised at the earliest possible moment, it cannot be urged for the first time in this Court.

The next point which is urged is that the decree-holders cannot proceed against the appellants as representatives of the deceased Jagadhar Prasad in execution without bringing a suit against them and having them adjudged liable to satisfy the decree passed against Jagadhar Prasad. It is conceded that S. 53, Civil P. C., now enables the decree-holder to proceed in execution against the property in the hands of a Hindu son who is liable for the payment of the debt due from his deceased father in respect of which a decree has been passed. It is however contended that S. 53 can apply only if S. 50 applies and that S. 50 will apply only to those cases where the judgment-debtor dies after the passing of the decree and before it is fully satisfied. There is no doubt that the case of *Narendra Bahadur Chand v. Gopal Sah* (7), seems at first sight to support the contention of the appellants as to the scope of S. 50. It appears to me however that when a decree is passed against a party

(6) A. I. R. 1923 P. C. 162=103 I. C. 417=55 I. A. 227=3 Luck. 314 (P. C.).

(7) [1912] 20 I. C. 506.

who dies before the passing of the decree, that decree would ordinarily be a nullity and it is not a nullity in this particular case owing to the special provision made by S. 23 of the Statute of 1833. Ordinarily therefore where a decree is passed against a dead person the execution may be successfully attacked by the legal representatives of the deceased judgment-debtor against whom it is sought to be executed even apart from S. 50, Civil P. C. When however we closely examine the language of S. 50 we find that it does not expressly exclude those cases where the judgment-debtor dies before the passing of the decree. It only refers to the death of the judgment-debtor before the decree has been fully satisfied and where therefore the decree is a good decree, as in the present case notwithstanding the death of the judgment-debtor before the passing of the decree, the case comes well within the terms of the section, because that death takes place also before the decree has been fully satisfied. In view of the wide language used in the section, I am unable to hold that the present case is not covered by it, and I think that if the facts of a case like the present had been before the learned Judges of the Calcutta High Court who decided the case of *Narendra Bahadur Chand v. Gopal Sah* (7), the decision would have been given in more guarded terms. In my opinion both Ss. 50 and 53 apply to this case and it is open to the decree holders to proceed in execution against the property in the hands of the appellants.

It was next contended that the decree for costs passed by the Privy Council is a money decree and can be executed against the property in the hands of the appellants only so long as the debt is not barred. It is conceded that the appellants being the sons of Jagadhar are under a pious obligation to satisfy his debts, but it is said that the obligation lasts only so long as the debt is not barred and it is contended on the authority of *Swaminatha Ayyar v. Vaidyanath Shastri* (8) that the present debt is barred as more than six years have elapsed since the passing of the decree by the Privy Council. It appears to me that there is a good deal of confusion behind this argument. It cannot be disputed that Art. 183 applies to

(8) [1905] 28 Mad. 466=15 M.L.J. 116 (F. B.).

this case and the execution may be commenced any time within 12 years of the passing of the decree. If so, the present decree is still a good decree and the obligation of the sons to pay the decree continues so long as the execution is commenced within 12 years of the date of the decree. The case decided by the Madras High Court on which reliance was placed was decided before S. 53 had been enacted, and when a decree against a Hindu deceased father could not be executed against his son without bringing a suit to fix his liability. Under those circumstances it was held that Art. 120, Lim. Act, applied and the suit must be brought within six years of the passing of the decree. Under the present Civil Procedure Code however a person who has obtained a decree against the father can proceed at once against the property in the hands of his son who is liable under the Hindu law for the payment of the debt of his deceased father and it is no longer necessary to apply Art. 120, Lim. Act, because in such cases either Art. 182 or Art. 183 will directly apply. It is urged by the learned advocate for the appellants that although a proceeding under S. 47 is not designated as a suit, yet it is of the same character as a suit and so Art. 120 would still apply. This argument may be shortly met by pointing out that if a proceeding under S. 47 cannot be designated as a suit and is always initiated by means of an application, Art. 120, which is meant to be applied to suits, and suits only, is manifestly inapplicable. It is then urged that Art. 181 which is a residuary article for application should be applied in this case; but here also the appellants may be met with the answer that the residuary article would be wholly inapplicable because Art. 183 is directly applicable. This point also must therefore be decided against the appellants.

The last point that was urged was that the decree-holders are not competent to execute this decree under O. 21, R. 15, on behalf of the other decree-holders because it is not a joint decree. This objection is based on the fact that the trial Court awarded separate costs to defendants 1, 4, 5 to 8, 9, 10 and 11 respectively, and it is urged that the liabilities of the judgment-debtors to the various defendants being separately de-

fined, the decree passed cannot be held to be a joint decree. The Court below has dealt with this point in the following manner:

"In spite of the fact that the liabilities of the judgment-debtors to the different decree-holders were specified in the decree of the Subordinate Judge that fact would not take away from it the force of a joint decree. At p. 609 of D. F. Mulla's Code of Civil Procedure, Edn. 8, it is said; 'It is no less a joint decree because the shares of A and B in the decretal amount have been determined by the decree. Thus, if it is determined by the decree that the share of A is Rs. 2,000 and the share of B is Rs. 3,000 the decree is still a joint decree.'" I therefore hold that the decree of the first Court was a joint decree and the present decree-holders are entitled to execute it under the provisions of O. 21, R. 15, Civil P. C."

The view of the learned Subordinate Judge seems to be supported to some extent by the decision of the Judicial Committee in *Hurrish Chunder Chawdhry v. Kali Sundari Debi* (9). In that case the effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a moiety in a taluk in the possession of the defendant, who purchased the interest of one of them, it was held that the other co-plaintiff could obtain execution according to the extent of her interest in the estate. The learned advocate for the appellants has attempted to distinguish that case and there is no doubt that the facts in that case were somewhat different from the facts of the present case. But it is to be remembered in the first place that the term "joint decree" is wide enough to apply to a case where the rights of several parties have been determined by one and the same decree and in the second place that in this particular case the last decree passed by the Privy Council was admittedly a joint decree in the sense that the liability of the appellants to the various contesting respondents was not separately assessed or specified. If therefore the last decree into which the decree of the Courts below has merged is a joint decree and it is this final decree which is to be executed such a case would in my opinion come within O. 21, R. 15. As these are the only objections urged in this Court against the execution of the decree and as all of them fail, I would dismiss the appeal with costs.

Wort, J.—I have had the advantage of reading the judgment just now deli-

(9) [1882] 9 Cal 482=10 I. A. 4 (P. C.).

vered and am in agreement with it and have nothing to add.

B.R./R.K. *Appeal dismissed.*

A. I. R. 1932 Patna 265

ROSS, J.

Deb Kinkar Ghose—Plaintiff—Appellant.

v.

Bimalabala Sinha—Defendant—Respondent.

Appeal No. 580 of 1929, Decided on 13th June 1930, from decision of Dist. Judge, Bhagalpur, D/- 12th February 1929.

(a) **Deed—Construction—Previous misunderstanding deed of endowment and his rights thereunder does not affect his actual rights.**

The fact that a person has previously misunderstood a deed of endowment and his rights thereunder does not affect his actual rights when the deed is rightly construed. [P 266 C 1]

(b) **Deed—Construction—Deed of endowment executed in Urdu by Bengali Hindu not well-versed in Urdu—Words "Pesran, Warisan, Kaymokamian" used in deed to limit trustees of endowment—Words held to include male line alone and daughters of donor held to be excluded from trusteeship.**

A deed of endowment to a family deity was executed by a Bengali Hindu not well-versed in Urdu, in Urdu language. The words "Pesran, Warisan, Kaymokamian" were used in the deed to limit trusteeship of the endowment:

Held: that in view of the facts of the case, the said words limited the trusteeship of the endowment to the male line of descent of the donor and even the donor's daughters were excluded from trusteeship. In Persian the said words generally connoted or meant "sons, heirs and representatives." [P 266 C 2]

S. M. Mullick, Khurshaid Hussain and S. S. Bose—for Appellant.

A. K. Roy and N. C. Roy—for Respondent.

Judgment.—This is an appeal against the decree of the District Judge of Bhagalpur, confirming the decision of the Munsif in a suit brought by the plaintiff for a declaration that he was the sole trustee of a religious endowment created by his grandfather. The donor was Govind Charan Ghose who had one son, Madhusudan Ghose. He had two sons Chaitanya and Debkinkar. The plaintiff Chaitanya died in 1920 leaving three daughters two of whom were then married and the third, the defendant, unmarried. She has since married. The Courts below have found on a construction of the deed of endowment, which was in favour of the family, that the plaintiff is not the sole trustee.

The question turns on the effect to be given to the words "Pesran, Warisan, Kaymokamian" which occur repeatedly in the deed of endowment, these words meaning sons, heirs and representatives. It was contended on behalf of the respondent that the use of these words merely limits an estate of inheritance. This argument in my opinion is meaningless in the context in which these words are used. There is no question of an estate of inheritance so far as the descendants of the donors are concerned. It was a gift out and out to the deity, and the heirs and representatives of the donor were specific duties : the payment of the Government revenue, the application of the income as shebait, and the management and supervision of the trust property. It is therefore in my opinion meaningless to say that these words limit an estate of inheritance in the heirs and representatives of the donor.

Then reference was made to the conduct of the plaintiffs as evidenced in a plaint (Ex. A) and a lease (Ex. D). He had therein acknowledged the position of the defendant as a co trustee. And the khewat was also referred to where the plaintiff and his brother are recorded as owners with eight annas share each. The learned District Judge has made much of this and also the fact that the family is governed by the Dayabhaga law. But the fact that the plaintiff may have misunderstood his rights and misconstrued the deed of endowment cannot affect his right now, and the khewat overlooks the essential fact which governs the relation of trustees, viz., that they are joint tenants. It is perfectly immaterial whether the family is governed by Dayabhaga law or not. The heirs and representatives of the donor are trustees admittedly, and as trustees they take as joint tenants.

The question then is what is the proper construction to be placed on the language used in this document. I should observe generally that this document was executed by a Bengali Hindu and was written apparently by a Bihari Hindu who was not a Kayastha and cannot be presumed to have had a great knowledge of the Urdu language ; and the evidence is that the Urdu is not good Urdu. The first word used is "Pesran" which means sons. Some meaning must be given to this especially as it was strictly inapplicable to the circumstances of the donor's

family inasmuch as he had only one son. Consequently he must be taken to have looked further ahead than his own immediate descendant ; and what was in his mind apparently was the male line of descent as if the word used had been "Putra Putradi." It is true that this is not correct Urdu ; but having regard to the apparent intention of the donor and the language which as a Bengali Hindu he would naturally use, it seems to me that this is not an unreasonable construction to put upon this Persian word. And it is reasonable to suppose that he had in his mind a limitation to the male line, because this was an endowment of the family deity and, if the management went into the hands of the daughter who might live anywhere (and in the present instance the defendant is married in Birbhum District while the property is in Bhagalpur), it would become practically impossible.

But if the word "Pesran" is not used in this sense then we have to look to the word "heirs." The three words used represent gradually widening classes. Every son is an heir and also a legal representative. An heir is a legal representative and may not be a son, and a legal representative may be neither the one nor the other. Consequently it seems to me that these classes have to be exhausted in succession. If "Pesran" is not used in the sense that I have considered most probable, then there is no representative of that class in existence and we have now to turn to the next wider class "Warisan." Admittedly Debkinkar the plaintiff is an heir and admittedly the defendant is not an heir. Consequently on the strict construction of the language, the daughter has no right. The plaintiff's right is admitted. The fallacy in the judgment of the Courts below seems to lie in this: that because the defendant's father was a joint trustee with the plaintiff therefore on his death the defendant has succeeded to his interest. But this overlooks the fact that we are dealing with trust property and not with a beneficial interest ; and also it overlooks the fact that Chaitanya there was nothing in the trust that could go to his heirs. I would therefore allow this appeal, set aside the decree of the Court below and decree the plaintiff's suit with costs throughout. There will be a decree that the plaintiff is the sole present shebait of the deity, and that the

name of the defendants be removed from the Collectorate registers as joint shebait, and there will be an injunction permanently restraining the defendant from interfering with the management of the trust properties.

B.V./R.K.

Appeal allowed.

A. I. R. 1932 Patna 267

COURTNEY-TERRELL, C. J. AND
FAZL ALI, J.

Bimalabala Sinha—Appellant.

v.

Deb Kinkar Ghosh—Respondent.

Letters Patent Appeal No. 84 of 1930, Decided on 26th June 1931, from decision of Ross, J., reported in *A. I. R. 1932 Pat. 265*.

(a) Hindu Law — Religious endowment — Shebait—Intention of donor clear—No extraneous evidence is admissible to construe document executed by him—Words of document not clear—Intention may be gathered in light of surrounding circumstances and considerations present in mind of Hindu founder.

Directions given by the founder of a religious endowment as to how the office of the shebait is to devolve are not to be construed on the same principle as the gift of the property, the most obvious distinction being that the founder of a trust is generally concerned about the fitness of the person who is to carry on the trust after his death, but no such considerations arise in the case of a gift to a private individual.

When the intention of the donor is clearly expressed, there can obviously be no difficulty in construing the document and no extraneous evidence would be admissible for the purpose. Where however the words used in the document are not very clear the intention of the executant may be construed not only in the light of the surrounding circumstances but also of such considerations as are generally present in the mind of a Hindu founder of a trust.

A document executed by the founder of a religious endowment ran as follows:

"First of all the Government revenue having been paid through me and after me through my sons, heirs, representatives the entire produce thereof shall be spent on daily puja and the other necessary items and feeding sadhus, saints and Brahmins by me as the sevak and after my death by my sons, heirs, representatives. My heirs and representatives shall have on no account any right to sell the said mauza dedicated to the said temple. I and after me my sons, heirs and representatives shall take care of all the things mentioned above, sadar and mofussil, appertaining to the said mauza and the temple."

The document was written in Urdu and the words which repeatedly occurred in it were "pisran, warisan, kayammokamian," meaning sons, heirs, and representatives, respectively.

Held: that there was no question of an estate of inheritance. There was a gift out and out to the deity and the office of the shebait was to devolve in accordance with the intention of the donor so far as could be gathered from the

document. The use of the word "pisran" indicated that the founder preferred male descendants to occupy the office of the shebait; in their absence the shebait was to be chosen from the heirs, and lastly from among the legal representatives of the donor. The grandson of the donor was therefore entitled to a declaration that he was the sole shebait of the deity as against a female descendant of the donor who claimed to be a co-shebait: 4 B. L. R. 103 and *A. I. R. 1926 Bom. 309, Ref.* [P 269 C 1]

(b) Evidence Act (1872), S. 115—Admission of point of law does not make the admission matter of estoppel.

An admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel within S. 115. It is not the case of a person who knows or must be deemed to know the real state of things creating by his representation a belief in the mind of the person who does not know the real state of things, for, quite apart from any representation made by the plaintiff, the defendant must be deemed to know what his legal rights are: 21 All. 285, *Foll.* [P 269 C 2]

A. K. Roy and N. C. Roy—for Appellant.

S. M. Mullik, Khurshaid Hussain, S. S. Bose and N. C. Ghosh—for Respondent.

Fazl Ali, J.—The question to be decided in this appeal is, whether the plaintiff is entitled to a declaration that he is the sole shebait of a certain idol and whether the defendant who claims to be a co-shebait with the plaintiff should be restrained from interfering with the management of the debuttar property. It appears that of the five properties dedicated to the idol, three were endowed by one Gobind Charan Ghose, the common ancestor of the parties and two by his son Madhusudan Ghose. It is common ground that Gobind Charan Ghose was the first shebait of the deity and was as such in possession of all the five properties during his lifetime. He was succeeded by his son Madhusudan Ghose and upon the death of the latter his two sons, the plaintiff and one Chitannya Prasad Ghose, became shebait. When Chaitannya died, the defendant, his only unmarried daughter who was a minor at that time, was recorded as a shebait in respect of two of the properties and the plaintiff who was then acting as her guardian supported her claim. In 1925 however when the defendant applied for registration of her name in respect of the other three mauzas, the plaintiff contested her application and stated that he had allowed her name to be recorded in respect of the two properties under a misapprehension of law. His conten-

tion was overruled and so he brought this suit for a declaration that he was the sole shebait of the deity and prayed that the name of the defendant be removed from the Collectorate register and that the defendant be permanently restrained from interfering with the management of the debuttar properties. The suit was dismissed by the first two Courts, but it was decreed on appeal to this Court by Ross, J., against whose decision this appeal has been preferred.

It appears to me that the result of the appeal depends entirely upon the construction of a document (Ex. 2), dated 20th February 1863 by which Gobind Charan Ghose dedicated two of the endowed properties, as it is the only document in which some mention is made as to how the dedicated properties are to be managed. The important passage in this document runs thus :

"First of all the Government revenue having been paid through me and after me through my sons, heirs, representatives, the entire produce thereof shall be spent on daily puja and the other necessary items and feeding sadhus, saints and Brahmins by me as the sevak and after my death by my sons, heirs, representatives. My heirs and representatives shall have on no account any right to sell the said mauza dedicated to the said temple. I and after me my sons, heirs, representatives, shall take care of all the things mentioned above, sadar and mofussil, appertaining to the said mauza and the temple."

The document is written in Urdu and the words which occur repeatedly in it are, "pisran, warisan, kayammokamian" which may be translated as sons, heirs, representatives. The view taken by Ross, J., is that the word "pisran" or sons must have been used by the founder of the trust with some object and his conclusion is that this word indicates that the latter preferred the male line of descendants to occupy the office of the shebait. He is also of opinion that the three words used in the document represent gradually widening classes from whom the shebait was intended to be chosen and that these classes have to be exhausted in succession. In other words, if the male descendants were not available, then the shebait was to be chosen from among the heirs and lastly from among the legal representatives of the donor. Now, it may be conceded at once that it is not very easy to construe the document especially as it was drafted by one who was not a lawyer and who did not know the Urdu language well. Taking how-

ever all the circumstances into consideration I am inclined to agree with the interpretation put upon the document by Ross, J. There is no doubt that the use of the word "sons" must have some significance and the founder of the endowment would not have used three words where two of them were sufficient to convey his meaning. I am also not prepared to accept the suggestion that the donor simply meant to provide as to who should succeed him as a shebait immediately after his death and that he left the office to devolve according to the ordinary rule of succession afterwards. As Ross, J., points out the use of the plural pisran (sons) was strictly speaking inappropriate to the circumstances of the donor's family inasmuch as he had actually one son ; but even apart from this there is no reason to assume that, while the donor showed some concern about his immediate successor, he should have been entirely indifferent as to whether the shebait to be appointed in after generations were fit to hold the office or not. How is then the direction in the deed to be construed? The word "pisar" is a Persian word meaning a son, and although, strictly speaking, the word in its Persian sense does not include a grandson, yet that was the only word available to a scribe to be used in a document written in Urdu and he may have well used it to convey the sense which is usually conveyed by the term "putra" which is the Sanskrit word for a son. Dr. Gour says in his Hindu Code that sons include paternal grandsons and great grandson and adds the explanation :

"The term "putra" is used in the Sanskrit texts in that generic sense as comprising the next three male descendants."

This proposition is not contested by the learned advocate for the appellant, and if the word "sons" is construed in this broad sense, the plaintiff evidently has a preferential claim to the shebaitship of the donor as his grandson. He is also admittedly an heir of the donor and thus if the word "pisar" is construed in its strict sense, he would succeed as a representative of the wider class referred to in the document as "heirs." The appellant's claim in this case is based mainly upon the fact that she is the heir of Chaitannya who was a coshebait with the plaintiff. That circumstance however will not help the defendant because, as

Ross, J., pointed out, there is no question of an estate of inheritance in this case. Here there was a gift out and out to the deity and the office of the shebait is to devolve in accordance with the intention of the donor so far as it can be gathered from the document. Mr. Ray has referred to a number of decisions which have only re-affirmed the view taken in *G. M. Tagore v. U. M. Tagore* (1) at p. 182. This view was expressed thus by Sir Barnes Peacock :

"A gift to a man and his sons and grandsons or to a man and his sons' sons would in the absence of anything showing contrary intention pass a general estate of inheritance according to Hindu law."

But the directions given by the founder of a religious endowment as to how the office of the shebait is to devolve are not to be construed on the same principle as the gift of property. The most obvious distinction is that the founder of a trust is generally concerned about the fitness of the person who is to carry on the trust after his death, but no such considerations generally arise in the case of a gift to a private individual. When the intention of the donor is clearly expressed, there can obviously be no difficulty in construing the document and no extraneous evidence would be admissible for the purpose. Where however the words used in the document are not very clear, the intention of the executant may, I take it, be construed not only in the light of the surrounding circumstances, but also of such considerations as are generally present in the mind of a Hindu founder of a trust. In this view Ross, J., was in my opinion quite justified in referring to the fact that a daughter who might be married anywhere cannot look after the debuttar properties so well as his son. To the same effect are also the following observations made by Madgavkar, J., in *Ranchhod Mayaram v. Bai Jaijantip*, A. I. R. 1926 Bom. 309, in the following passage :

"The respondent's claim really rests upon the right now in question being treated as a heritable right in exactly the same manner as ordinary property under Hindu law. But both by reason of the grant being in favour of the Goddess and particularly the third condition of inalienability by way of gift or deed of inheritance, the right to officiate and to enjoy the net profits cannot be placed absolutely on a par with the rights to succession in ordinary Hindu property. The *vahivat* in the grant was in our opinion meant to be assigned to the family of Dayaram; and

the moment any descendant passed out of the family, as for example by adoption or by marriage, the right ipso facto ceased. Any other view such as the one for which the respondents contend would not only widen the succession beyond undue bounds, but would lead to difficulties in carrying out the worship for which in this particular case access to the joint family house is necessary."

It appears to me therefore that on the construction of the document the plaintiff is entitled to succeed and in this view I consider it wholly unnecessary to go into the other questions which were discussed at the Bar, namely, whether the defendant would have been entitled to be a co-shebait or not in the absence of any direction by the founder of the trust and whether or not by reason of the fact that the plaintiff was a co-trustee he would become the sole trustee after the death of his brother by survivorship. It was contended by the learned advocate for the appellant that this decision should govern only the two properties which are covered by Ex. 2 and not the others. But the case appears to me to have been tried throughout on the footing that all the properties are incorporated in the same trust and I do not think that it was the intention of anyone that there should be one class of shebaits in respect of some of the properties and a different class of shebaits in respect of the others. There is another point which deserves a passing notice. It is said that the plaintiff himself having admitted the claim of the defendant in the Land Registration proceedings in respect of two of the endowed properties is estopped from questioning her right to be a co-shebait with him now. It has been held in *Jagwant Singh v. Silan Singh* (2) and certain other cases that an admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel within S. 115, Evidence Act. To adopt the language used in that case :

"it is not the case of a person who knows or must be deemed to know the real state of things creating by his representation a belief in the mind of a person who does not know the real state of things; for, quite apart from any representation made by the plaintiff, the defendants must be deemed to have known what their legal rights were."

In my judgment this appeal should be dismissed with costs.

Courtney-Terrell, C. J.—I agree.

R.M./R.K.

Appeal dismissed.

(2) [1899] 21 All. 285=(1899) A. W. N. 66.

(1) [1870] 4 B. L. R. 103.

A. I. R. 1932 Patna 270

WORT AND JAMES, JJ.

Mt. Sheoratan Koer and others — Appellants.

v.

Kamta Prasad—Respondent.

Appeal No. 10 of 1929, Decided on 15th December 1931, against original decree of Sub-Judge, Chapra, D/- 9th October 1928.

Transfer of Property Act (1882), S. 52 — Lis pendens—Subsequent mortgagee, prior to being impleaded in mortgage suit, assigning mortgagee rights to plaintiff—Plaintiff is not affected by lis pendens and can redeem prior mortgage from purchaser in mortgage decree.

A subsequent mortgagee assigned to the plaintiff his mortgagee rights during the pendency of a suit based on prior mortgage to which he was no party at the date of the assignment. Subsequently he was impleaded as a party to that suit.

Held that : the plaintiff was not affected by the doctrine of lis pendens and he was entitled to redeem the prior mortgage by paying the amount due under it to the purchaser of the property under the decree based on the prior mortgage : *Bellamy v. Salbine*, (1857) 1 De G. & J. 566 ; A. I. R. 1922 P. C. 11 and 18 Cal. 164 (P. C.), *Ref.* ; A. I. R. 1921 P. C. 125, *Expl.* A. I. R. 1927 Pat. 25 and A. I. R. 1930 Pat. 579, *Dist.* [P 271 C 1]

Held further : that the plaintiff could redeem the defendant only on the payment of the amount due under the mortgage. [P 272 C 2]

Khurshed Husnain, P. P. Varma and B. P. Varma—for Appellants.

Ram Prasad and Jadubans Sahay—for Respondents.

Wort, J.—This is the defendants' appeal in an action brought by the plaintiff in which he claimed a mortgage decree and also a right to redeem a mortgage decree passed in Suit No. 500 of 1921. It raises three questions : the first is a question of law which relates to the doctrine of lis pendens. The question is whether that doctrine as set out in S. 52, T. P. Act, affects the transaction under which the plaintiff got his title. The second question is a question of fact whether that transaction is a real one or merely a colourable one ; and the third question raises a number of points as to the respective rights of the parties in the following circumstances :

The owner of six villages executed a mortgage to the predecessor-in-title of the defendants of one village, namely, Darail, and subsequently, that is, on 9th

November 1914, and on 4th August 1915, he executed other mortgages of the whole six villages to the predecessor-in-title of the plaintiff. An action was brought by the mortgagee under a prior mortgage on 3rd August 1921. The subsequent mortgagee was not joined as a party until 17th February 1922. In the meantime on 4th October 1921, he had assigned his mortgage to the plaintiff. Judgment was obtained in the suit of 1921 against the mortgagor but Sukhdeo, who had not been a party, having parted with his interest presumably, did not exercise any right, if he had such at the time, to redeem. I have stated that he was made a party on 17th February 1922 ; but as a matter of fact that was the date upon which the plaintiff made an application to the Court to make him a party, and presumably therefore it was some days subsequent to that that he was actually joined as defendant. The suit brought by the assignee of Sukhdeo was brought on 20th May 1927. The first question that is argued by Mr. Khurshed Husnain on behalf of the defendants is that the transaction, that is to say, the assignment of 4th October 1921, gives the plaintiff no title. S. 52, T. P. Act, is as follows :

"During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor-General-in-Council or of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court."

Now so far as regards the rights of Sukhdeo himself are concerned, it is clear I think that they disappeared by reason of the judgment and decree in the suit brought by the prior mortgagee, and it is contended that the same results would follow with regard to the rights of Sukhdeo's assignee, namely, the plaintiff. Mr. Husnain seeks to read the words of S. 52, T. P. Act, "by any party" as being merely descriptive and having no reference to the time at which the transaction took place by the person who could be described as a party to the suit. It is contended that the doctrine of lis pendens as set out in S. 52 is wider than that of the English doctrine itself to this extent that under the present law of England the

doctrine has no effect unless there is registration of the judgment under the Act of 1839. But the English law is stated by the Lord Chancellor in the case of *Bellamy v. Sabine* (1). He says in the course of his judgment :

"It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

In my judgment it is impossible to read the words in S. 52, T. P. Act, "by any party" in the way in which Mr. Husnain seeks to read them and it can have reference only to the date upon which the transaction which it is sought to assail actually took place. In October of 1921 it is obvious from the facts which I have stated that Sukhdeo was not a party to the suit. He was at liberty therefore to assign the property to the plaintiff which he did, and in my judgment the transaction is in no way affected by S. 52, T. P. Act. (His Lordship then considered the question whether the transaction was genuine and proceeded). Now the plaintiff, as I have stated, claimed in his plaint that he may be authorized to redeem the mortgage decree in Suit No. 500 of 1921. The learned Subordinate Judge decided the case in favour of the plaintiff, but in his decree he merely gives him a decree for sale of the mortgaged property Darail; he makes no mention of the plaintiff's right to redeem the prior mortgage. Now there can be no doubt that in the present state of the law the plaintiff has such a right. That that right existed was decided in the case of *Umes Chunder Sirkar v. Zahur Fatima* (2). Subsequent to that the Transfer of Property Act was enacted and under S. 89 it was held that the execution of the mortgage decree had the effect, if I may use the expression, of merging the mortgage in the decree, and to that extent the law as laid down in *Umes Chunder Sirkar's* case (2) was altered. Then S. 89, T. P. Act, was repealed and substituted therefor was O. 34, Civil P. C. It has now been decided

in the case of *Sulghi v. Ghulam Safdar Khan* (3) that the law is now as it was prior to the passing of the Transfer of Property Act and therefore the defendant in this case being the purchaser of the decree in Suit No. 500 of 1921 can use his prior mortgage as a shield against the subsequent mortgagor. Therefore the plaintiff must redeem his mortgage before he can bring the property, namely, the village Darail, to sale.

It is contended by Mr. Husnain that although the plaintiff has a right to redeem he must redeem, to use the expression at the Bar, over against the plaintiff. That contention is based upon the observation of Lord Haldane in the case of *Yadalli Beg v. Tukaram* (4). That was a case in which the owner of 16 fields had mortgaged them in 1893 to the defendant in the action; in 1896 the mortgagor had sold and conveyed one of those fields to the plaintiff in the action; in 1899 the first mortgagee brought a suit against the original mortgagor not impleading the purchaser of 1896 and obtained a decree by consent, and ultimately in execution of that decree the plaintiff mortgagee had purchased nine out of the 16 fields. The plaintiff purchaser in the sale of 1896 then brought his action for redemption, and it was held that he had a right to redeem the whole mortgage, and, in the course of the judgment, Lord Haldane makes this statement :

"According to English law the respondents would have been entitled to redeem the mortgage in its entirety subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption."

It is to be noticed from the fact which I have already stated that the purchase of the mortgagee decree-holder was confined to nine only of the 16 fields, and therefore, presumably, the right in the other seven fields may have passed to a third party. That point is not dealt with by Lord Haldane specifically. He states that that point had not arisen in the case then before them; but the words :

"the safeguarding of the equal title to redeem of any other person,"

it is contended, have been construed in this Court as referring to the rights of

(1) [1857] 1 De G. & J. 566=26 L. J. Ch. 797=3 Jur. (n. s.) 913=6 W.R. 1.

(2) [1889] 18 Cal. 164=17 I.A. 201=5 Sar. 507 (P.C.).

(3) A.I.R. 1922 P.C. 11=65 I. C. 151=48 I. A. 465=43 All. 469 (P.C.).

(4) A.I.R. 1921 P. C. 125=57 I.C. 535=47 I.A. 207=48 Cal. 22 (P.C.).

the first mortgagee and therefore the first mortgagee, namely, the defendant in this case has a right to use again the expression at the Bar, to redeem over against the plaintiff. The most important case in this Court is the case of *Mt. Azizunnissa v. Komal Singh* (5). In the meantime there had been a decision of Adami and Macpherson, JJ., in the case of *Promotha Nath Mitter v. Ram Kishan Singh* (6), but a perusal of that judgment, in my opinion, does not go beyond the decision in the case of *Yadalli Beg v. Tukaram* (4), decided by the Privy Council. We come then to the case to which I have just made reference *Mt. Azizunnissa v. Komal Singh* (5). The facts that are necessary to notice in that case are these: in 1907 there had been a mortgage of three villages described as N, O and P to what I may describe as the first mortgagee Y. Subsequently in 1908 village P had been mortgaged to Z: in 1915 the first mortgagee instituted a suit on his mortgage without impleading the puisne mortgagee Z, and in execution of that decree he had purchased village N. Subsequently the second mortgagee instituted a suit without impleading the first mortgagee and in execution of his decree village P was purchased by him and subsequently sold to A, a third person. In the meantime the first mortgagee had taken out a further execution and had put up for sale the other villages N and O. Then came the action of A, the purchaser in the decree obtained by the second mortgagee for possession of village P. But it is contended that the observations of Kulwant Sahay, J., in that case bears out the contention of the defendant. The observations to which I refer are these:

"The purchaser of the mortgaged properties in execution of a mortgage decree acquires not only the interest of the mortgagee but also the equity of redemption of the mortgagor, and he is entitled to redeem other mortgages on the same property created by the mortgagor. Defendant 1 as a purchaser of one of the mortgaged properties has acquired the equity of redemption of Jawad Hussain and can claim a right to redeem the entire mortgage of the plaintiffs inasmuch as he is not bound by the decree obtained by the plaintiffs in the suit on their mortgage as her predecessor-in-title was not made a party thereto."

But the decision of the Court clearly appears to be that the right to redeem by the person who is in the position in this

action of the defendant was limited to the village that had been mortgaged to the subsequent mortgagee. In my judgment therefore the case of *Mt. Azizunnissa v. Komal Singh* (5), does not bear out the contention that the words of Lord Haldane in the case of *Yadalli Beg v. Tukaram* (4) intended to refer to a person in the position of the defendant in this action. I think it is obvious, as contended by the learned advocate on behalf of the plaintiff, that if the defendant had such a right, the plaintiff's rights arising as a subsequent mortgagee to redeem would be utterly destroyed. Therefore the decree of the learned Subordinate Judge must be modified by allowing the plaintiff to redeem the prior mortgage of village Darail which, in execution of his decree, as I have already stated, the predecessor-in-title of the defendant had purchased and of which he was ultimately given possession. In taking the accounts therefore the interest which the defendant is entitled to will be at the bond rate up to the date of possession; but from the time of the delivery of possession, possession must be deemed to be equivalent to interest.

There was one other point which I should have dealt with. It was contended by the plaintiff that he was entitled to redeem by paying the amount which the defendant paid for the property in the execution sale. But it is quite clear on the authorities—and there can be no doubt of that—that the mortgage is still subsisting. The plaintiff can redeem the defendant only on the payment of the amount due under the mortgage. In this case it must be remembered that there was a consent decree, that is to say, the parties had come to terms as to what was due upon the mortgage and it is that amount together with interest which the plaintiff will be under liability to pay in redeeming the defendants. With these modifications the appeal is dismissed with costs.

James, J.—I agree.

K.N./R.K.

Appeal dismissed.

(5) A.I.R. 1930 Pat. 579=130 I. C. 33=9 Pat. 930.

(6) A.I.R. 1927 Pat. 25=97 I. C. 386.

"A. I. R. 1932 Patna 273

ROSS AND CHATTERJI, JJ.

Janki Saran Singh and others—Plaintiffs—Appellants.

v.

Mohammad Ismail and others—Defendants—Respondents.

Second Appeal No. 749 of 1928, Decided on 6th August 1930, against decision of Addl. Dist. Judge, Patna, D/- 28th November 1927.

Transfer of Property Act (1882), S. 68—Word "mortgagor" refers also to heirs or assignees.

It would be placing much too narrow a construction on S. 68 to limit the word 'mortgagor' to the actual mortgagor himself. That section applies equally to the heir or assignee of the equity of redemption according to the ordinary rules of construction of Statutes. [P 274 C 1]

On a conveyance for value of lands subject to a mortgage, and expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of a purchaser to indemnify the vendor against personal liability on foot of the mortgage. *Case law referred.* [P 274 C 2]

N. N. Sinha and B. P. Sinha—for Appellants.

K. Husnain, Ganesh Sharma and Hareshwar Prasad Sinha—for Respondents.

Ross, J.—The predecessor-in-interest of the plaintiffs had a usufructuary mortgage over specific lands in a three annas patti in Jahangirpur Mangalpal belonging to one Dharam Lal, the predecessor of defendants 5 to 8. After this usufructuary mortgage which was created in the year 1865 Dharam Lal borrowed money on a simple mortgage of his share from the predecessor of defendants 2 to 4 who brought a suit on that mortgage and in execution of the mortgage decree purchased the share. Thereafter there was a Collectorate partition with the result that the specific lands mortgaged to the plaintiffs, who were no parties to the partition, fell into the share of other maliks who dispossessed the plaintiffs. The claim in the present suit was against defendants 2 to 4 for specific lands equivalent to the lands that were in usufructuary mortgage to the plaintiffs and in the alternative for a decree for Rupees 2,060-14-11 with interest, being the amount of the mortgage debt. The defence was that S. 99, Estates Partition Act, had no application and that the defendants 2 to 4 not being the mortgagors, S. 68, T. P. Act, had no application either. The Subordinate Judge gave

effect to this defence and dismissed the suit against defendants 2 to 4 while granting the plaintiffs a decree ex parte against defendants 5 to 8 for the money claimed. This decree was affirmed by the Additional District Judge.

The learned advocate for the appellants does not contest the decision with regard to S. 99, Estates Partition Act, which in terms is plainly inapplicable. His argument is that under S. 68 (c), T. P. Act, he is entitled to recover the mortgage money because the mortgagor has failed to secure possession of the property to him without disturbance by any other person and that he is entitled to this remedy against the successors-in-interest of the original mortgagor i. e., defendants 2 to 4.

On the side of the respondents it is argued that the true remedy for the plaintiffs was to continue in possession of the land that was mortgaged to them. This is the view that the learned Judge has taken. I express no opinion on this point because it is clear on the authorities that whether the plaintiffs had that remedy or not, they have the remedy under S. 68 (c) at all events against the original mortgagor; *Talak Singh v. Jalal Singh* (1) is a clear authority on this point. That decision was followed by this Court in *Ramnandan Parbat v. Deni Sahi* (2). Both these cases are indistinguishable on the facts from the present case except for the further point that arises here, namely, the liability of an assignee of the equity of redemption. In *Talak Singh v. Jalal Singh* (1) the contest was between the usufructuary mortgagee and the mortgagor, and in *Ramnandan Parbat v. Deni Sahi* (2) the contest was between the mortgagee and the legal representative (in that case the heir) of the mortgagor. The present case contains the additional element that the contest is between the mortgagee and the purchaser of the interest of the mortgagor in execution of a decree on a subsequent mortgage. This, so far as the appellants are concerned, is equivalent to an assignment of the equity of redemption, because as the usufructuary mortgage of the appellants was anterior to the simple mortgage of the respondents all the respondents purchased in their execution was the equity to redeem the

(1) [1909] 5 I. C. 130.

(2) A.I.R. 1924 Pat. 91=74 I.C. 877.

appellants. It seems to me that it would be placing much too narrow a construction on S. 68 to limit the word 'mortgagor' to the actual mortgagor himself and if the section applies to heirs, as the decision in *Ramnandan Parbat v. Deni Sahi* (2) shows, it seems to me that it must be equally applicable to assignees. *Ramakrishnama v. Vuvvati Chengu Aiyar* (3) was a case under S. 68 (b) and it was held 'that that section applied equally to the heir or assignee of the equity of redemption' according to the ordinary rules of construction of Statutes. The learned District Judge has distinguished that case on the ground that it was a case of waste, but that makes absolutely no difference.

It is argued for the respondents that although they may be liable they would only have been liable to the extent of the mortgaged property if it had been in their hands. But it is no longer theirs and they have no personal liability for the mortgage debt. It is true that in the absence of any express covenant the assignee of the equity of redemption would not ordinarily become liable under the personal covenant in the mortgage, but,

"on the assignment of the equity of redemption the cases show that though the assignee does not become personally liable to the mortgagee, he is by implication bound to indemnify the mortgagor: *White and Tudor*, Edn. 8, Vol. 2, p. 44; see also *Dart on Vendors and Purchasers*, Edn. 8, Vol. 1, p. 502."

The principle was stated by Lord Eldon in *Waring v. Ward* (4) thus:

"The same principle applies to the purchase of an equity of redemption for the party means to buy the estate subject to that mortgage, in relation to which mortgage the personal contract was entered into, and that was not his. If he enters into no obligation with the party from whom he purchases neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession and has the profits, would independent of contract, raise upon his conscience an obligation to pay the money due upon the vendor's transaction of mortgage, for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

These words have been frequently quoted and are of recognised authority. The whole matter was fully discussed in *Adair v. Carden* (5) where all the autho-

rities were discussed and it was held that on a conveyance for value of lands subject to a mortgage, and expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of a purchaser to indemnify the vendor against personal liability on foot of the mortgage. The same principle was followed in *Bridgman v. Daw* (6). This principle was recognised by the Court of Appeal in *Mills v. United Counties Bank Limited* (7) where Fletcher Moulton, L. J., said:

"The doctrine of *Waring v. Ward* (4) that there is an implied covenant on the part of a purchaser of an equity of redemption to indemnify the vendor against the mortgage debt is based on good sense. It relates I think to every case where you can reasonably imply that it was the intention of the parties that that should be done but I doubt whether it applies to any other case."

Farwell, L. J. said:

"He (i. e. the trial Judge) treats the unwritten obligation which binds the transferee of an equity of redemption to indemnify the transferor against the mortgage debt as if it were a legal covenant. I venture to think that it is and has always been treated as one of those equities, independent of contract, of which there are many instances in the books."

Sir Rash Behari Ghosh in his work on mortgages Vol. 1, p. 300 refers to *Waring v. Ward* (4) for the principle which he there states. In the absence of any evidence it must be taken that the predecessor of the defendants 2 to 4 in purchasing this property had allowance made for the existing mortgage; and it is clearly inequitable that they should hold the property free of the obligation. If there had not been any partition it is clear that the lands of defendants 2 to 4 would have been liable, and I do not see any reason why a partition should discharge their liability. It was argued that the words 'any other person' in S. 68 (c) mean 'any other person having title or claiming under a title' and authorities were quoted: *Gopalasami v. Arunachella* (8) and *Nakchedi Ram v. Ram Charitar Rai* (9). There is no doubt that this is the correct construction. But this is not a case of dispossession by a trespasser. The plaintiffs were dispossessed by the delivery of possession under the partition decree to certain cosharers to whom these lands had been allotted.

(6) [1891] 40 W.R. 253.

(7) [1912] 1 Ch. 231=81 L. J. Ch. 210=28 T. L. R. 40=105 L.T. 742.

(8) [1892] 15 Mad. 304=2 M.L.J. 122.

(9) [1897] 19 All. 191=(1897) A.W.N. 14.

(3) A I.R. 1915 Mad. 633=33 I.C. 321.

(4) [1802] 7 Ves. Jun. 332.

(5) [1892] 29 L.R. Ir. 469.

These cosharers were in no sense trespassers, but they stood on exactly the same title as the mortgagor himself.

In my opinion therefore this appeal should succeed and the decree passed by the courts below should be varied. There should be a decree against defendants 2 to 4 represented by defendant 1 for Rs. 1,933-5-4 principal and Rupees 127-9-7 interest up to the date of suit and this amount will carry interest from the date of the decision of the trial Court at six per cent. per annum until realisation. The plaintiffs are entitled to their costs throughout against defendants 2 to 4 represented by defendant 1.

Chatterji, J.—I agree.

K.N./R.K. *Appeal allowed.*

*** A. I. R. 1932 Patna 275**

COURTNEY-TERRELL, C. J. AND
ROWLAND, J.

Syed Mohammad Ismail—Applicant.
v.

Janaki Saran Singh and others—Opposite Parties.

Civil Revn. No. 89 of 1930, Decided on 4th February 1932.

(a) Civil P.C. (1908), O. 47, R. 1—Words “Any other sufficient reason” are ejusdem generis—Cases relied on by Court but not discussed at the Bar is no ground for review—Practice.

The words “any other sufficient reason” are ejusdem generis with the words of O. 47, R. 1.
[P 275 C 2]

It is a well established principle that if there comes to the knowledge of the Court cases which in its opinion establish that one party or the other is entitled to a decision, that, ordinarily, unless the cases are statements of elementary principles, the side against whom the decision is to be given, on the basis of those cases, should be given an opportunity of dealing with the cases, but if that is not done it does not come within the class of circumstances which give an applicant a right to a review of the decision.

[P 275 C 2, P 276 C 1]

*** (b) Civil P. C. (1908), O. 47, R. 1—Faulty logic and error of law is no ground for review.**

That a Judge proceeded upon faulty logic for coming to his conclusion and in any event was wrong in law is not an argument which can be used to support an application for review.

[P 276 C 1]

Hasan Imam and G. Sharma — for Applicant.

B. P. Sinha and H. P. Sinha — for Opposite Parties.

Courtney-Terrell, C. J.—This is an application under O. 47, R. 1, Civil P.C., for a review of a judgment in *Janaki Saran v. Mahomed Ismail* (1) delivered by a Bench of this Court consisting of

(1) A. I. R. 1932 Pat. 273.

Ross, J., and Jyotirmoy Chatterji, J. The application for review was admitted for hearing by Ross, J., Chatterji, J., having at that time ceased to be a member of the Court, and the notice was issued and the matter has been argued before us by Mr. Hasan Imam on behalf of the applicant as to whether a review can or cannot be heard upon the grounds urged by him. The grounds which he has urged are three in number.

To deal with the first ground it appears on his exposition of the facts that when the case was argued before the Bench the learned Judges reserved judgment and when they came to deliver judgment they based their decision upon principles of law which they said were supported by certain decisions in the English reports. As a matter of fact those decisions in the English reports were not referred to in the course of the hearing of the case and we are assured by Mr. Hasan Imam, and it may be true, that he could have shown, had he had the opportunity, that those cases did not support the principles of law as laid down by the learned Judges and had nothing to do with the case. For the purposes of this decision I will assume that he would have been able to establish that contention, although we have had no opportunity of deciding the merits of the case. That fact even if it be established is not one of the facts which entitles a party to a review of judgment. The grounds upon which a review can be allowed are stated in O. 47, R. 1. The fact which I have referred to does not come under the head, and admittedly does not come under the head of discovery of new and important matter or evidence nor does it come under the head of mistake or error apparent on the face of the record and there is a long series of decisions which lay down the principle that the words “any other sufficient reason” are ejusdem generis with the words of the section. In my opinion therefore the fact that the judgment purports to rely upon decisions to which the advocates at the trial had no opportunity of referring is not a ground for review. I may here say that it is a well established principle that if there comes to the knowledge of the Court cases which in their opinion establish that one party or the other is entitled to a decision, that ordinarily, unless the cases are

statements of elementary principles, the side against whom the decision is to be given, on the basis of those cases, should be given an opportunity of dealing the cases, and it might have been better, assuming that Mr. Hasan Imam is right in his contention of law, that Ross, J., should have set down the case, on discovery of these cases, for further argument based on those decisions, but the course taken does not come within the class of circumstances which give an applicant a right to a review of the decision.

The second point was based upon a passage in the judgment in which the learned Judges said that one of the contentions of law raised by Mr. Hasan Imam did not call for decision because whatever the right view upon that contention Mr. Hasan Imam's client had a remedy under a certain section of the Transfer of Property Act. Mr. Hasan Imam's contention is that he would have been able to show to the learned Judges that in fact that particular section did not give him a remedy and that the learned Judges were wrong in thinking that he had any remedy under that section and therefore it was incumbent upon the Judges to have decided the first contention that I have mentioned. That again is merely another way of saying that the learned Judges proceeded upon faulty logic for coming to their conclusion and in any event were wrong in law. Now neither of these two arguments can be used to support an application for review.

The third point is that there has been an error of record apparent upon the face of it. The point may be shortly stated thus. The suit was a mortgage suit and there were two claims for relief. One of the claims was undoubtedly a claim not for relief against the defendants personally but for an ordinary mortgage relief by sale of the property. The second claim set forth in the plaint may possibly be a claim of the ordinary mortgage character and not be a claim for personal relief. On the other hand its construction is a matter which requires some examination. It is perfectly clear that the District Judge before whom this matter came on first appeal had placed before him the contention of the plaintiff that the plaintiff was entitled to a personal decree and the District Judge con-

sidered that contention and disallowed it. The matter was again raised by the plaintiff before Ross, J., and Chatterji, J., and they apparently took the other view and came to the conclusion that a personal decree should be granted. Now Mr. Hasan Imam wishes to refer to the plaint for the purpose of showing that the claims were for mortgage relief only and not for personal relief and to demonstrate that the learned Judges had failed to appreciate that fact and if they had appreciated it which he says is apparent on the face of the record, they would have come to another conclusion. The matter having been decided by the District Judge and having been clearly re-argued before the two Judges who heard this case in second appeal it is clear that whether they took the right view of the construction of the plaint or not they did give attention to the point and they gave judgment for a personal relief. All of the matters which have been placed before us were matters which might properly have been placed before a Court of appeal if any Court of appeal had jurisdiction to deal with the decision, but they are none of them matters which come within the legitimate grounds which can be urged in support of an application for review. In my opinion therefore this application should be dismissed with costs.

Rowland, J.—I agree.

K.N./R.K. *Application dismissed.*

A. I. R. 1932 Patna 276

COURTNEY-TERRELL, C. J.

Birdhi Chand Jaipuria—Petitioner.

v.

Darbari Jayaswal and others—Opposite Parties.

Criminal Revn. No. 252 of 1932, Decided on 14th June 1932, against order of Subdivisional Officer, Purulia, D/- 13th February 1932.

(a) Penal Code (1860), Ss. 186 and 147—Public officer only carrying out official instructions—Instruction not patently illegal—Resistance to him in carrying out orders amounts to offence.

If a public officer does no more than act upon the official instructions he has received and if those official instructions are not of such a kind as to be obviously and patently illegal then he acts properly in carrying out such orders and resistance to a public officer carrying out orders which upon the face of them are not open to objection and are in proper form is an offence against the statute. [P 278 C 2, P 279 C 1]

In execution of a decree the naib nazir proceeded to execute a writ of attachment directing him to attach and keep in his custody the moveable and immovable property of the judgment-debtor unless he should receive payment of the sum for which the decree was passed, but was obstructed by a party of men armed with lathis who attacked him and his companions with stones:

Held: that not only was there no unlawful act on the part of the naib nazir, but in any case the resistance offered was entirely out of proportion and unnecessary for the purpose of preventing him from carrying out his duty. [P 279 C 1]

(b) **Criminal P. C. (1898), S. 439—High Court rarely sets aside acquittal—It may do so under unusual circumstances.**

The High Court very rarely sets aside an acquittal by a Magistrate, but where the circumstances of a case are unusual and call for such action on the part of the Court it would set aside acquittal. [P 277 C 1]

S. M. Gupta—for Petitioner.

Shiveshwar Dayal, Govt. Pleader and *S. Biswas*—for Opposite Parties.

Judgment.—This is a petition for the revision of a decision of the Subdivisional Officer of Manbhum acquitting certain persons who were charged under Ss. 186 and 147, I. P. C. It is rarely that this Court sets aside an acquittal by a Magistrate, but the circumstances of this case are somewhat unusual and call for such action on the part of this Court. It would appear that there had been a suit between two parties of Marwaris which resulted in a decree in favour of the plaintiff for the payment of a sum of money by the defendants, and in execution of that decree a naib nazir of the District Judge's Court went to Balarampur to execute a writ of attachment against the property of Chunilal Lahariwala and five other persons. He was accompanied by civil Court peons, by a pleader of the decree holder and by an individual named Madan Lal Jaipuria who is a grandson of one of the decree holders and who went with the naib nazir for the purposes of identification. The writ of attachment was in ordinary form and directed the naib nazir to attach and keep in his custody the moveable and immovable property of the judgment-debtors unless he should receive payment of the sum for which the decree was passed. The persons who have ultimately been accused in this case are firstly one Darbari Jayaswal who appears to be a servant of the judgment-debtor's firm. Then there are a number of persons: Lakshmi Narayan, Mahabir Prasad Lahariwala and Jokhiram Lahariwala who appear to be mem-

bers of the family, who constitute the defendant firm, and there is also one Aminuddin who was a servant.

When the naib nazir was taken by the pleader and Madan Lal Jaipuria to the place where the defendant firm carry on their business he was first taken to the house which was occupied by them and he there met a number of members of the firm including the actual judgment-debtors and read out and explained the writ of attachment and demanded the money which was payable. They replied that they had no money and told the naib nazir that he could do what he liked. Thereupon he went round to the main entrance of the house, but found the door of the courtyard locked and a large crowd of people armed with various weapons. Considering discretion to be the better part of valour he left a peon there with directions to see that nothing was removed from the house, and went to another place of business of the judgment-debtors hoping to have better fortune. He first visited a *lac* factory of the judgment debtors and here also he found a similar state of affairs. The doors were locked and an armed party was waiting for the reception of the officer. There again the nazir repeated his procedure. He left a peon to watch the factory and went on a second journey to a flour mill. There again the same procedure was repeated. He found an armed party and the place locked up. Then he went to a shop where miscellaneous articles were sold by the judgment-debtors and there again he found people posted. By this time it dawned upon the naib nazir that the defendants intended to resist his efforts to execute the writ of attachment, a not unreasonable inference from what he found. He wired to the Subordinate Judge to give him police assistance and he also went round to the police station and asked for help there, and there is an entry in the station diary to that effect. As a matter of fact the writer head constable had already anticipated something of the kind because he had received information that the defendants were going to hire persons of violence and to offer resistance to the attachment.

The naib nazir after these adventures finally went to the guddi of the decree-holders and he found that the two principal judgment-debtors were there with a certain gentleman of the neighbourhood,

and these persons re-assured him and said that there would be no trouble in executing the attachment and asked him to proceed. Thereupon he went to the flour mill, broke the lock on the door, and went inside and with assistance he took up an iron chest which was found in the office and proceeded to take it away and to put it on to a lorry. In the meantime the persons accused returned to the place with a large crowd and said that they would not allow the chest to be taken away and they struck Madan Lal, the identifier, and threw stones. Madan Lal ran away and then the whole verandah was surrounded by men with lathis in their hands and the taxi in which Madan Lal was seeking to escape was subjected to a volley of stones and the hood was broken. The civil Court peons who had been posted at various places by the naib nazir naturally began to be frightened and then finally the naib nazir came away leaving the iron chest on the verandah of the flour mill. The consequence of all this was that the naib nazir submitted a report to the Subordinate Judge who ordered him to complain to the Court, cognizance was taken and these persons were made accused and charged with resisting a public officer in the discharge of his duty and also with rioting.

When the case came before the subdivisional officer he first of all spent some months in taking evidence. It is an astounding fact that this case was allowed to drag on for I think seven months, adjournments being asked for from time to time and acceded to by the subdivisional officer. I must say in justice to him that he has most commendably kept an admirable order-sheet in which the whole of the details of the various hearings and adjournments are entered up in a way which permits of their very easy comprehension and I may say moreover, if it is any satisfaction to the subdivisional officer, that he has the admirable quality of being a most excellent penman for the entries which he made are beautifully legible. Nevertheless the numerous adjournments are really inexcusable. I have almost given up in despair protesting against the ridiculous delays that take place in petty criminal cases before Magistrates and any observations I have to make upon this subject I feel sure will fall upon deaf ears. A case which might

reasonably take 20 minutes before a competent Magistrate is allowed by means of adjournments to drag on for months. However, ultimately the case reached a stage when the Magistrate felt that he might safely listen to the arguments of legal advisers and it appears that there was propounded to the Magistrate on behalf of the accused persons an argument of a somewhat curious character. Astonishing to say this argument seems to have found favour with the Magistrate, and without waiting to consider whether the evidence proved the complicity of the various persons accused in the offence with which they were charged he decided that the accused could not be convicted of either of the charges by reason of this point of law which was urged on their behalf.

The supposed point of law was to this effect: that the rules as to attachment provided that when immovable property is seized the attaching officer should give an opportunity first of all for the value of the attached property to be ascertained and then should give an opportunity to the persons whose property it is to have the property kept in safe custody rather than to remove it into the officer's own custody. As a matter of fact the writ of attachment is perfectly clear upon the face of it. The directions are to the officer that he is to seize the property and keep it in his custody, and whether or not there exist any rules such as are spoken of and which are said to have been derived from the practice in Calcutta I am not concerned to inquire. The Magistrate however was unable to find on the evidence that the naib nazir had gone through the formality of asking the persons present when he seized the chest whether they wished to avail themselves of this procedure or not. He therefore came to the conclusion that the removal of the iron chest without the offer of the procedure described deprived the nazir of any justification, and in fact deprived him of any jurisdiction. He apparently did not see the simple and obvious point that the naib nazir had a warrant addressed to him which it was his duty to obey, and it was not the duty of the naib nazir to question the form of the directions which he received, and the law is and I should have thought it an elementary proposition, that if a public officer does no more than act upon the official

instructions he has received, and if those official instructions are not of such a kind as to be obviously and patently illegal, then he acts properly in carrying out such orders and, resistance to a public officer carrying out orders which upon the face of them are not open to objection and are in proper form is an offence against the statute.

The subdivisional officer seems to have been completely misled by the argument and although he has devoted much anxiety and care in an attempt to look up all the authorities and statutes which he thought might have a bearing upon the matter he has got into a hopeless and unnecessary tangle. He should have treated the argument very summarily and merely looked at the warrant of attachment and seen whether the officer was doing something which was not contained in the writ of attachment which would have justified reasonable resistance and only such reasonable resistance as was necessary for the purpose of resisting an unlawful act. In this case not only was there no unlawful act on the part of the naib nazir, but in any case the resistance offered was entirely out of proportion and unnecessary for the purpose of preventing him from carrying out his duty. I feel it my duty therefore to set aside, in the particular circumstances of this case, the acquittal. I shall remand this case to the subdivisional officer who tried it. It will not be necessary for him to take any further evidence inasmuch as all the evidence which is relevant has already been taken. He will then proceed ignoring the plea of an alleged right of lawful resistance, to estimate according to law the evidence and to decide whether or not the individuals who have been accused are guilty of the offences imputed to them, and he should remember that an offence of this kind of resistance to an officer of the Court is a serious offence and must be dealt with as such.

I may add that not only does the record of the case show wholly unnecessary delays in dealing with the matter, but the cross-examination of the witnesses and the examination-in-chief seem to have been prolonged to an extraordinary length and in future the Magistrate would be well advised to take a firm line with persons who waste the time of the Court by asking unnecessary questions.

I therefore remit this case to the Magistrate to be dealt with according to law.

R.M./R.K.

Case remanded.

A. I. R. 1932 Patna 279

COURTNEY-TERRELL, C. J. AND
KULWANT SAHAY, J.

Nagarmal Marwari and others—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 441 of 1931, Decided on 7th December 1931, against order of Sess. Judge, Manbhum-Sambalpur, D/- 11th August 1931.

(a) Civil P. C. (1908), O. 21, R. 46—Provisions do not empower executing officer to seal up premises other than those used by the judgment-debtor for containing goods which attempt is made to seize.

Order 21, R. 46, provides for dealing by the attaching officer with goods which are in the physical possession of a third party whether or not the ownership of the goods be in the judgment-debtor or in the third party and whether or not the legal right to possession be in the judgment-debtor or the third party. The rule is only intended to deal with the case of physical possession by a party other than the judgment-debtor. The provisions for attachment do not cover the right of the executing officer to seal up premises other than those used by the judgment-debtor for containing the goods which an attempt is made to seize. [P 280 C 2; P 281 C 1]

(b) Penal Code (1860), S. 186—Goods in judgment-debtor's shop anticipating order of attachment removed to other's premises—Executing officer trying to seal up door of those premises—Owner of premises obstructing him is not guilty under S. 186.

On institution of a suit by a creditor to recover money against Y, A transferred the goods in Y's shop to his own shop, anticipating an order of attachment before judgment. On an order for attachment being passed, the executing officer, under the orders of the Court sought to seal up the door of the premises where the goods were transferred, whereupon they were obstructed by A. The executing officer insisted on performing the act and A then left the place:

Held: that A had committed no offence and could not be convicted under S. 186. [P 281 C 1]

Ali Imam and G. P. Das—for Petitioners.

Asstt. Govt. Advocate—for the Crown.

Courtney-Terrell, C. J.—This is a petition for the revision of a judgment of the Sessions Judge of Sambalpur rejecting an appeal from the decision of a First Class Magistrate of Sambalpur, by which the four petitioners were convicted under S. 186, I. P. C., and sentenced for resisting a public officer in the execution of his duty. The relevant facts as found by the Sessions Judge are as follows: Three of the petitioners were creditors of one

Yusuf Ali who had a shop at Sambalpur for the sale of stationery and other miscellaneous articles. These creditors between them claimed from Yusuf Ali a sum of roughly Rs. 3,000. They were also apparently friends of his. On 19th November another creditor Rai Bahadur Biseswar Daga began a suit in the Munsif's Court for the recovery of a sum of Rs. 900 and anticipating that this suit was about to be filed and that the plaintiff would apply for an order of attachment the petitioners in arrangement with Yusuf Ali began to transfer from the shop of Yusuf Ali to their own shop which is close by the goods standing in Yusuf Ali's shop. They succeeded in transferring to their own premises a considerable quantity of goods. As the petitioners and Yusuf Ali anticipated the plaintiff Rai Bahadur Biseswar Daga in his suit did in fact file an application for attachment before judgment. The writ of attachment directed the officer to

'attach the articles belonging to the defendant mentioned below as identified by the plaintiffs and keep the same under safe and secure custody until the further order of the Court.

Then the schedule given at the bottom states as follows:

"The various miscellaneous articles consisting of lanterns, soaps, trunks, karahis, balties, perfumed oils, etc., of the defendant's stationery shop at Dalaipara, Sambalpur."

Armed with this writ of attachment the peon went at half-past four on 19th November to execute it accompanied by an identifier on behalf of the plaintiff. He found the shop of Yusuf Ali locked but the identifier pointed out a godown adjacent to the shop which is in fact part of the premises belonging to the petitioners. There was no key with which to open the door and the peon wished to break down the door when the petitioners appeared and resisted him and ordered him to leave the place. He went back to the Munsif and reported to him what had occurred and showed him in support of his statement some sentences that had been written out by the identifier on the back of the writ of attachment narrating the facts. The Munsif directed the nazir himself to go with the peon and to seal up the door of the godown which had been pointed out by the identifier, and when the nazir and the peon went to perform this operation the petitioners again obstructed them. Then the nazir insisted upon performing the act he had been

ordered to do and the petitioners left the place. They have since been prosecuted on the complaint of the Munsif under S. 186, I. P. C. for resisting his officers acting in pursuance of their duty. They were convicted by the Magistrate and on appeal the learned Sessions Judge has confirmed the conviction although he has reduced the sentence.

The substantial point taken on the application for revision is this. It is said by the petitioners that the act performed by the peon and the nazir in sealing up the godown which belonged to them was an unlawful act and one which their warrant of attachment did not entitle them to perform. It is argued that the goods of which they were in search were in the possession of the petitioners and not in the possession of Yusuf Ali. The petitioners in fact set up before the Magistrate and before the Sessions Judge the assertion that they had in fact purchased these goods from Yusuf Ali on the preceding day, that is to say, on 18th November, and they produced some written instrument in support of their assertion. The learned Sessions Judge has found that the story of a transfer of the goods on the preceding day to the petitioners is untrue and that the goods still remained the property of Yusuf Ali, but he has gone on to say that the possession claimed by the petitioners of the goods in question is not a bona fide possession but is merely possession on behalf of the debtor Yusuf Ali and therefore that R. 46, O. 21, Civil P. C., has no application and the procedure of the nazir and peon in sealing up the warehouse was lawful. It has been argued here on behalf of the Crown and against the petitioners in revision that R. 46, O. 21, applies only to circumstances in which possession by a third party is bona fide. It has scarcely however been attempted to argue that the provisions for attachment cover the right of the executing officer to seal up premises other than those used by the judgment-debtor for containing the goods which an attempt is made to seize. In my opinion the contention of the petitioners is sound. R. 46 provides the means for dealing by the attaching officer with goods which are in the physical possession of a third party whether or not the ownership of the goods be in the judgment-debtor or in the third party and whether or not the legal right to possession be in

the judgment-debtor or in the third party.

The rule is only intended to deal with the case of physical possession by a party other than the judgment-debtor. To hold otherwise would give rise to great practical inconvenience because it frequently happens that the owner of a warehouse has large quantities of goods belonging to various persons and whether or not he allows persons to have access to that warehouse for the purpose of dealing at their own time and their own will with the goods placed in his charge, it would nevertheless be an extraordinary proceeding to allow the officers of the Court to seal up the warehouse and thereby prevent owners of goods which had no concern whatever with the attachment order from getting at such goods. Accordingly on the finding of fact arrived at by the learned Sessions Judge I am of opinion that his conclusion in law is unsound and that having found that the physical possession was in the hands of the petitioners and not in the hands of the judgment-debtor he should in law have proceeded then to find that the procedure of the nazir and peon in attempting to seal up the petitioners' warehouse was unjustified. The actual physical resistance to the peon does not appear in the circumstances to have been more than they were justified in using in resisting an unlawful proceeding. No injury seems to have been inflicted upon him and accordingly, in my opinion, no offence has in law been committed and I would allow this application in revision and direct that the conviction be set aside and the fine if paid be refunded. A notice for enhancement of sentence was issued and this will now be discharged.

Kulwant Sahay, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1932 Patna 281

COURTNEY-TERRELL, C. J.

Abdul Rauf—Petitioner.

v.

Banarsi Lal—Opposite Party.

Criminal Revn. No. 248 of 1932, Decided on 13th June 1932, against order of Senior Deputy Magistrate, Dhanbad, D/- 6th February 1932.

(a) **Bihar and Orissa Mining Settlements Act (1920), S. 19 (1), (2)—Sub-S. (2) is ejusdem generis with sub-S. (1)—“Take such order” refers to positive acts of construction or destruction.**

Sub-S. (2), S. 19, is ejusdem generis with the first sub-section of 19 and the words “take such order” refer to positive acts of construction or destruction in relation to the property concerned which may be required in furtherance of the measures of the Board. So also the words “prevent or abate a nuisance” refer to a specific nuisance which the Act required will prevent or abate. [P 283 C 1, 2]

(b) **Bihar and Orissa Mining Settlements Act (1920), S. 26 (3)—Board cannot issue notice to individual not to erect building without its consent and to treat erection of building as offence under S. 26 (3)—Bye-laws must first be framed in respect of the matter.**

There is no justification under the Act for the claim on the part of the Board to issue an order to a specific individual that he shall not in future erect a building without the consent of the Board and then to treat the erection of a building which otherwise does not infringe any rule or bye-law as an offence under sub-S. (3), S. 26. It is however open to the Board if any person will infringe a by-law or a rule or if he shall fail to comply with a requisition under S. 19 to take appropriate proceedings. [P 283 C 2]

The Board created under the Act, on recommendation of their medical officer, issued a notice under S. 19 (2) to a thiccadar of a *hat*, ordering him not to permit any new structure in the said bazar and without first submitting a site plan and details of construction and obtaining written approval of the medical officer. On the thiccadar allowing the raising of new structure, the Board summoned him to appear and answer a charge of having committed an offence under S. 26 (3).

Held: that no offence under S. 26 (3) was committed. The word “order” in paras. (a) and (b) sub-S. (3) S. 26, did not refer to such notice as was issued to the thiccadar. The proper course for the Board was to make a bye-law in respect of the matter. It was not open to the Board to escape the provisions of S. 25 (2) requiring the consent of the Local Government to its by-laws by framing what was in effect a by-law and addressing it to a single individual out of many so as to bring it within the scope of the word “order” in S. 26 (3). [P 284 C 1]

(c) **Interpretation of Statutes—Acts providing for public control of privately owned property for municipal and sanitary purposes—Absence of definition of “owner”—Meaning of word must be sought from examination of general objects of Act.**

In nearly all legislation which provides for public control of privately owned property for municipal and sanitary purposes the word “owner” receives a definition in the enactment itself appropriate to the purposes of the particular enactment; otherwise the meaning of the word as used in the enactment must be sought from an examination of the general objects of the Act provided it is not inconsistent with the specific terms used. [P 283 C 2, P 284 C 1]

(d) **Bihar and Orissa Mining Settlements Act (1920), S. 19 (2)**—"Landholder or owner of house property"—Right of control is real test of liability.

The meaning of the Act is not to confine the term "land-holder or owner of the house property" to any rigid conception of legal ownership but to make the right of control the real test of liability. [P 284 C 1]

A thiccadar of a *hat* is in a position to control and manage the buildings in which the stallholders sit and who pay their rent to him.

[P 284 C 1]

(e) **Interpretation of Statutes—Penal section.**

A penal section must be strictly construed.

[P 284 C 1]

B. N. Mittra—for Petitioner.

K. P. Jayaswal and *Jaffar Imam*—for Opposite Party.

Judgment.—The petitioner was convicted by the Senior Deputy Magistrate at Dhanbad of an offence under S. 26 (3), Bihar and Orissa Mining Settlements Act, 1920, and was fined Rs. 50 with one month's simple imprisonment in default. An application was made to the Additional District Magistrate by the petitioner to refer the case to the High Court and upon his refusal to do so this petition for revision of the original order was filed. The Bihar and Orissa Mining Settlements Act applies to specified areas in Dhanbad, the object of the Act being to make better provision for preventing the outbreak and spread in the prescribed area of epidemic disease. S. 26 (3) enacts:

"Whoever (a) fails to comply with any requisition or order made under any provision of this Act or of any rule, bye-law or order made thereunder; or (b) contravenes any provision of this Act or any rule, bye-law or order thereunder, for the breach of which no penalty is otherwise provided, shall be punishable with fine"

The petitioner is a temporary thiccadar under the Jharia Raj who are the owners of the soil and in particular of a set of pucca buildings in which is held periodically the Jharia *hat* bazar. The precise terms of the thicca have not been proved, but it is perfectly clear from the evidence in the case that the thiccadar manages the *hat* and has the right of collecting rents from the persons who use the buildings and any supplementary buildings which may be erected and sell their goods on the occasions when the *hat* is held. It would appear from the evidence that the Board created under the Act on the recommendation of their medical officer on 29th January 1931

issued a notice to the petitioner in the following terms:

"Whereas it has been brought to the notice of Board by its Chief Medical Officer that you permit erection of insanitary structures and thereby allow congestion in the Jharia *hat* bazar, notice is hereby given you under S. 19 (2), Bihar and Orissa Mining Settlements Act, 1920, and you are ordered not to permit in future construction of any new structure in the said bazar without first submitting a site plan and details of construction and obtaining the written approval of each plan by the Chief Medical Officer."

The Board on 30th October 1931 sanctioned the prosecution of the petitioner and summoned him to appear to answer a charge of having committed an offence under S. 26 (3) of the Act. Evidence was then called before the Magistrate first proving the service of the notice to which I have referred above upon the petitioner and then proving that within six months of the summons the petitioner had allowed one Dalu Ram to extend his shop by making an additional structure and in view of the notice it was contended and held by the Magistrate that the petitioner had by permitting Dalu Ram, one of the shopkeepers to extend the premises of his shop by erecting an additional structure in contravention of the terms of the said notice committed an offence under S. 26 (3). The Act must be examined for the purpose of ascertaining the powers of the Board created under it. By S. 18 the Board is empowered to undertake measures for water supply, sanitation, for providing housing for residents, to prevent the outbreak and spread of disease, for the treatment of the sick and the establishment of hospitals and generally to carry out the purposes of the Act. This is a general clause and with it we are not for the moment concerned. S. 19 (1) deals with the case in which the owner of a mine has committed some act or omission in respect of his property which may necessitate measures by the Board and provides that in such circumstances the Board may by a notice specifying the measures to be taken, require the owner at his own cost to execute works necessary for carrying such measures into effect and to carry on such continuous or periodical operations as the Board may direct for carrying out such measures. By sub-S. (2):

"If the Board is satisfied that in order to prevent or abate a nuisance affecting the public

health it is necessary that any landholder or owner of house property in any part of the Mining Settlement should take certain order with any property belonging to him or in his possession or under his management, the Board may by notice require such person to take such order at his own costs."

This subsection is *eiusdem generis* with the first subsection and the words "take such order" clearly refer to positive acts of construction or destruction in relation to the property concerned which may be required in furtherance of the measures of the Board. S. 20 provides that any person required by a notice under sub-Ss. (1) and (3), S. 19 to do anything may object and the Board must hear his objections and by S. 21 if the work required by the notice under sub-Ss. (1) and (2), S. 19 is not taken to the satisfaction of the Board within a fixed period the Board can then carry out the operations required at the expense of the defaulter. S. 24 provides that the Local Government may make rules for carrying out purposes and objects of the Act and specifies the matters to which such rules may relate. With this section we are not concerned. S. 25 enables the Board itself to make by-laws consistent with the Act, but we are not concerned with any by-laws so made. Then by S. 26 (3) a fine is leviable upon any person who either fails to comply with the requisition or order under any provision of the Act or of any rule, bye-law or order made thereunder or contravenes any rule, by-law or order thereunder for which no penalty is otherwise provided.

Now it was not contended on behalf of the prosecution that the petitioner had infringed any rule or by-law, but it was urged that he had committed a breach of an "order" under the Act and the order referred to is the notice addressed to him personally directing him not to permit the erection of any new building without first lodging and obtaining sanction in respect of the plans of that building. It is also urged that under S. 19 (2) the Board was satisfied that it was necessary "in order to prevent or abate a nuisance" to direct the petitioner "to take certain order" with regard to the property under his management.

In my opinion neither of these contentions can be supported. To deal first with the argument based on S. 19 (2) the phrase "take certain order" refers

to a positive act which the Board has directed and the words "prevent or abate a nuisance" refer to a specific nuisance which the act required will prevent or abate. If he fails to perform the act required, the Board on the one hand may carry out the work at his expense and, on the other hand, under S. 26 (3) the person concerned may be fined, but I cannot find any justification under the Act for the claim on the part of the Board to issue an order to a specific individual that he shall not in future erect a building without the consent of the Board and then to treat the erection of a building which otherwise does not infringe any rule or by-law as an offence under sub S. (3), S. 26. It is however open to the Board if any person shall infringe a by-law or rule or if he shall fail to comply with a requisition under S. 19 to take appropriate proceedings. In this case there has been no requisition under S. 19 and consequently there has been no offence under S. 26 (3). It is on this ground that the petition for revision must succeed and the conviction be set aside and it is not a ground which has been argued in support of the petition.

The main ground urged in support of the petition, in my opinion, fails completely and in case it should be again raised it is necessary to deal with it. It has been urged that the petitioner being the mere *thiccadar* of the *hat* does not come within the phrase in S. 19 (2) "landholder or owner of house property" I may first dispose of what I consider to be an ineffective answer to this contention. It has been urged that under sub-S. (3) the word "owner" is defined by reference to S. 3, Mines Act. 1901, but a reference to that Act shows that the word "owner" is there defined only in its peculiar relation to ownership of mines. The property we are here concerned with is not a mine and the definition in the Indian Mines Act does not apply. In nearly all legislation which provides for public control of privately owned property for municipal and sanitary purposes the word "owner" receives a definition in the enactment itself appropriate to the purposes of the particular enactment; otherwise the meaning of the word as used in the enactment must be sought from an examination of the general objects of the

Act provided it is not inconsistent with the specific terms used. In S. 19 (2) the words

"any landholder or owner of house property in any part of the Mining Settlement should take certain order with any property belonging to him or in his possession or under his management"

indicate to my mind that the meaning of the Act was not to confine the terms "land-holder or owner of house property" to any rigid legal conception of ownership but to make right of control the real test of liability. It cannot be effectively denied that the thiccadar of the *hat* is in a position to control and manage the buildings in which the stall holders sit and who pay their rents to him and he is rightly made responsible for insanitary conditions existing on the property over which he has such control and management. The proper course for the Board would have been to make a by-law under S. 25 requiring all persons erecting or permitting to be erected on property in their possession or under their management new buildings to submit plans for such buildings to the Board. These by-laws will not take effect until confirmed by the Local Government and published in the Gazette under sub-S. (2), S. 25; if so confirmed they are broken, proceedings would be possible against a person committing a breach under S. 26 (3).

I may sum up my conclusions by stating that the word "order" in paras. (a) and (b), sub-S. (3), S. 26 does not refer to such a notice as was issued by the Board to the petitioner in this case. I regret my decision because, in my opinion, the case of the petitioner is without any moral merit but a penal section must be strictly construed and it is not open to the Board to escape the provisions of S. 25 (2) requiring the consent of the Local Government to its by-laws by framing what is in effect a by-law and addressing it to a single individual out of many and so to bring it within the scope of the word "order" in S. 26 (3).

R.M./R.K.

Order accordingly.

A. I. R. 1932 Patna 284

COURTNEY-TERRELL, C. J. AND

KULWANT SAHAY, J.

Bacha Singh—Plaintiff—Appellant.

v.

Daro Singh—Defendant—Respondent.

Letters Patent Appeal No. 31 of 1931, Decided on 22nd December 1931, against decision of Rowland, J., D/- 24th March 1931.

(a) Bengal Tenancy Act (1885), S. 148-A—Object of—One cosharer landlord can sue for his share of rent and decree shall be rent decree if other cosharers are impleaded and they refuse correct information.

The object of S. 148-A is clearly to protect a cosharer landlord against the refusal or neglect by his cosharers to enforce their claims to rent so depriving him of the advantages to be obtained from a rent decree as opposed to a money decree. All that is necessary is that a cosharer landlord should state in his plaint that he is unable to ascertain the entire amount of rent outstanding to all the cosharers owing to the refusal of the tenant or the other cosharers to furnish him with correct information. He must implead his cosharers and then the "plaintiff-cosharer landlord" shall be entitled to proceed with the suit for his share only of the rent; and a decree obtained by him in a suit so framed shall, as regards the remedies for enforcing the same, be as effectual as a decree obtained by a sole landlord or an entire body of landlords in a suit brought for the rent due to all the cosharers: 4 Pat. L. J. 500, Ref. [P 285 C 2]

(b) Bengal Tenancy Act (1885), S. 158-B (2)—Object of—Cosharer alone, who is affected can complain about validity of sale and not stranger.

The object of sub-S. (2) is the protection of the cosharers and if it is complied with, they and they alone, have a grievance and it is not open to a third party to take advantage of that grievance and allege that the sale is wholly invalid. The failure to effect notice is a mere irregularity and the only person entitled to complain of it is the cosharer affected. It is open to a cosharer to waive the benefit of the section. A. I. R. 1924 Cal. 408, Ref. [P 286 C 2]

S. M. Mullick and Ganesh Sharma — for Appellant.

L. K. Jha, B. N. Rai and R. Chaudhury— for Respondent.

Courtney-Terrell, C. J. — This appeal depends for its decision upon the construction of Ss. 148-A and 158-B (2), Ben. Ten. Act.

The facts are as follows: The plaintiff appellant sued for enforcement of a mortgage of an occupancy holding executed in his favour by the father of defend-

dant 1. He impleaded the mortgagors and subsequent purchasers. One of the latter, defendant 7, defended on the ground that he had purchased in execution of a decree for rent obtained by two of the seven cosharer landlords and that he had duly annulled the encumbrances under S. 167, Ben. Ten. Act, so that the right of the mortgagee-plaintiff was extinguished. The material facts as to the suit for rent are as follows: The two cosharer landlords who had sued representing a seven annas interest recited in their plaint that they had been unable to discover the amounts, if any due to the other maliks and impleaded the other maliks as defendants. Two of them were in the course of the suit joined as plaintiffs, the other three remaining de-

fendants. Eventually a decree was passed for the rent claimed by the two maliks who instituted the suit the proportional shares of the other maliks being merely noted in the margin of the decree. In the heading of the decree the names of all the cosharers are set forth as plaintiffs and the claim is stated as follows:

"Claim for recovery of Rs. 82-12-0 on account of principal amount of rent with cess and damages from 1325 F. to eight annas kist of 1328 F. of the yearly rent of Rs. 42-2-6 with cess in respect of 11 bighas 1 cottah 6 dhurs of land situate in Mauza Batharni."

The operative part of the decree was as follows:

"It is ordered and decreed that this suit be decreed inter partes with costs and future interest at 6 per cent per annum in favour of the plaintiff (sic).

	Account		
	Rs.	As.	p.
Share of Sukdeo Singh and Jangi Singh ...	25	14	0
Mahabir Singh	51	12	3
Sugo Singh and Ramsadagar Singh	25	14	6

	Rs. As. p.		
	Rs.	As.	p.
Share of the plaintiff	92	12	3
Costs ...	31	1	0
	123	13	0

and that the sum of Rs. 92-12-0 decretal amount and Rs. 31-3-0 costs on account of the costs of this suit with interest thereon at the rate of 6 per cent per annum from this date to date of realization be paid by the defendant to the plaintiffs (sic)."

In this mortgage suit by the plaintiff-appellant the Subordinate Judge has held that the rent suit did not comply with the terms of S. 148-A, Ben. Ten. Act, and that the decree was not for the consolidated amount of the rent due to all the 16 annas landlords but was a decree in favour of the two cosharers only who had brought the suit and was for their specific share and that it was accordingly not a rent decree but a money decree only and that the purchaser at the auction sale in execution had no power to annul the encumbrance held by the plaintiff. The decision of the first appellate Court and that of the single Judge of this Court in second appeal was against this view of the rent suit and decree, both of these Courts holding that S. 148-A had properly been complied with and that the decree was a rent decree in accordance with that section.

The second point set up by the plaintiff and upheld by the Subordinate Judge was that the defendants had not proved service of the notice of sale as required by S. 158-B (2), Ben. Ten. Act, inasmuch as the peon's report merely stated that the cosharer had not been found and that

the notice had been affixed to his house. It was contended that the defendants should have proved that resort had not been had to the procedure of affixing the notice to the door until search for the cosharer had been made by the peon with resultant failure to find him. It was held that this notice, not having been served, invalidated the sale and that the mortgagee-plaintiff was entitled to rely upon this defect. The decision of the Subordinate Judge on this point also was reversed by the first Court of appeal and by this Court in second appeal. As to the first point it was argued before us that a rent decree under S. 148-A must be a decree for the whole of the outstanding rent and that the mention in margin of the decree of shares of other cosharers made it a decree in favour of the amount due to the plaintiff-cosharer only which it was said was not contemplated by S. 148-A. In my opinion this view of S. 148-A is erroneous.

The object of the section is quite clearly to protect a plaintiff-cosharer landlord against refusal or neglect by his cosharers to enforce their claims to rent so depriving him of the advantages to be obtained from a rent decree as opposed to a money decree. All that is necessary is that a cosharer landlord should state in his plaint that he is un-

able to ascertain the entire amount of rent outstanding to all the cosharers owing to the refusal of the tenant or the other cosharers to furnish him with correct information. He must implead his cosharers and then the

"plaintiff-cosharer landlord shall be entitled to proceed with the suit for his share only of the rent, and a decree obtained by him in a suit so framed shall, as regards the remedies for enforcing the same, be as effectual as a decree obtained by a sole landlord or an entire body of landlords in a suit brought for the rent due to all the cosharers."

The meaning and object of the section was considered in this Court in the case of *Ram Dhyani Singh v. Pardip Singh* (1) by Manuk, J. The learned Judge stated:

"I am of opinion that the essential principles underlying that section are: (1) that the suit should, in form, be for the whole rent and in substance for the separate share of rent in arrears, (2) that the whole body of landlords are impleaded, with the allegation that the plaintiff has not been able to ascertain what, if any rents are due to the former. In such cases the whole rent due must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief, if and when the impleaded cosharers appear and claim any arrears as due to themselves. If his belief is accurate the Court will give him a decree for his share of the rent only as being the entire rent due; if inaccurate, the Court will investigate and decree the arrears due to the impleaded cosharers as well."

In accordance with the principles stated by Manuk, J., the Court which tried the rent suit did investigate the matter and clearly gave to the plaintiff a decree for his share of the rent only. This decree was made in the presence of all the cosharers and neither the other cosharers nor anyone else is entitled to question it either by stating that the decree was not for the entire rent due or otherwise. If the other cosharers had considered that some rent was outstanding and due to them they should have raised it in this suit. On the one hand therefore the decree was a decree for the entire rent due and in any case the words of the section are plain and even if the other cosharer landlords had not felt inclined to claim their shares the section allows the plaintiff-cosharer landlord to proceed with the suit for his share only of the rent and makes a decree for such share just as effectual as if it had been

(1) [1918] 4 Pat. L. J. 500=53 I. C. 91.

obtained by the entire body of landlords in a suit for the rent due to all of them. The rent suit and the decree were therefore in accordance with S. 148-A and the purchaser in execution was entitled to annul encumbrances.

The second point relied on by the plaintiff is based on the contention that the failure to effect notice of the sale required by S. 158-B (2) was an illegality which rendered the sale absolutely void. In my opinion his contention is equally unfounded. The object of the subsection is the protection of the cosharers and if it is not complied with, they and they alone, have a grievance and it is not open to a third party to take advantage of that grievance and allege that the sale is wholly invalid. The failure to effect notice is a mere irregularity and the only person entitled to complain of it is the cosharer affected. It is open to a cosharer to waive the benefit of the section. Now an illegality which would make the sale void cannot be the subject of waiver by anybody. The principle was clearly explained by Mookerjee, J., in *Rajani Kanta Ghose v. Sheikh Rahman Ghazi* (2). Both objections to the execution sale urged by the plaintiff-appellant therefore fail, and I would dismiss this appeal with costs.

Kulwant Sahay, J.—I agree.

K.N./R.K.

Appeal dismissed.

(2) A. I. R. 1924 Cal. 408=82 I. C. 507.

A. I. R. 1932 Patna 286

MACPHERSON AND FAZL ALI, JJ.

Sheshaiyer Rajamanner Aiyer — Appellant.

v.

Madanmohan Patnaik—Respondent.

Appeal No. 11 of 1930, Decided on 3rd February 1932, against original order of Sub-Judge, Cuttack, D/- 7th January 1930.

(a) Civil P. C. (1908), S. 41 — Execution—Court to which decree is transferred retains jurisdiction until transmission of certificate under S. 41.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until a certificate is transmitted under S. 41 to the Court which passed the decree: [P 287 C 2]
Case law referred.

(b) **Limitation Act (1908), Art. 182 — Application for execution returned by proper Court under misapprehension is step-in-aid of execution.**

If the Court to which a decree is sent for execution while retaining jurisdiction to execute the decree returns an application for execution which was properly made to it under a misapprehension, that will not prevent the making of the application from being tantamount at least to a step-in-aid of execution. [P 288 C 1, 2]

(c) **Civil P. C. (1908), O. 41, R. 25 — First appeal—High Court can investigate facts in interest of justice.**

Although the High Court in first appeal will be reluctant to investigate facts for the first time in appeal, yet, there is nothing in law to prevent such facts being investigated when the interests of justice so require, and to remand the case for that purpose. [P 288 C 1]

B. N. Dutt and S. P. Das Gupta— for Appellant.

B. N. Das—for Respondent.

Fazl Ali, J.—This is an appeal by the decree-holder against the decision of the Subordinate Judge of Cuttack dismissing his application for the execution of a decree on the ground that it is not capable of execution. It appears that the decree in question was passed by the Munsif of Berhampur on 16th February 1922. Subsequently it was transferred to the Subordinate Judge of Cuttack for execution and some property belonging to the judgment-debtor was sold and purchased by the appellant. On 18th February 1925, the appellant applied for delivery of possession and possession was delivered to him. On 31st October 1924, the execution case was dismissed on part satisfaction and it appears that an intimation of this fact was sent to the Court at Berhampur on 3rd November 1924. On 31st October 1927, the appellant made another application for execution to the Subordinate Judge of Cuttack, but his application was returned to him by the learned Subordinate Judge who was of the opinion that it could not be executed without there being a fresh certificate of transfer from the Court at Berhampur. The appellant accordingly applied at Berhampur on 10th December 1927, for the transmission of the decree but this application was dismissed for default. On 7th July 1928, he filed a fresh application at Berhampur for the transfer of the decree which was granted. The decree was received by the District Judge of Cuttack on 4th December 1928, and was sent by him to the Subordinate Judge of Cuttack

for execution. On 16th April 1929, the present application was filed by the decree-holder.

The view taken by the learned Subordinate Judge is that as the first application for execution was disposed of on 31st October 1924, and the subsequent application for transfer was made on 10th December 1927, the execution is barred and the decree cannot be executed. The appellant tried to save limitation by contending before the learned Subordinate Judge that his application for delivery of possession made on 18th February 1925, was a step-in-aid of execution. This contention was however overruled on the ground that it had been definitely decided by this Court in *Triloke Nath Jha v. Bansman Jha* (1) that an application for delivery of possession by the decree-holder auction-purchaser is not a step-in-aid of execution.

The point which is raised now in appeal by the decree-holder is that the application for execution filed by him before the Subordinate Judge of Cuttack on 31st October 1927, was an application made to the proper Court in accordance with law. It is contended that the Subordinate Judge of Cuttack would continue to have the jurisdiction to execute the decree until a certificate was transmitted by it to the Court which passed the decree as required under S. 41, Civil P. C. Now, as a proposition of law, it is true that the Court to which a decree is sent for execution retains its jurisdiction to execute the decree until a certificate is transmitted to the Court which passed the decree under S. 41, Civil P. C. In *Abda Begum v. Muzaffar Husen Khan* (2) it was held that the Court to which the decree is transferred for execution will retain its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree or has executed it so far as the Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The same view was held in *Manorath Das v. Ambika*

(1) A.I.R. 1923 Pat. 22=72 I.C. 938=2 Pat. 249.

(2) [1897] 20 All. 129=(1897) A. W. N. 218.

Kant Bose (3) ; *Vithu Daulata Patil v. Ganesh Ramchandra* (4) and *Muhammad Ibrahim v. Chattoo Lal* (5).

Before however the appellant can succeed on this point, it is necessary for him to show that no certificate was transmitted in this case by the Subordinate Judge of Cuttack under S. 41, Civil P. C. It is contended by the learned advocate for the respondent that the question whether a certificate required by S. 41 was transmitted by the Subordinate Judge of Cuttack to the Court of Berhampur or not is a question of fact and the appellant should have asked the Court below to investigate it. Not having done so in the Court below, the matter cannot, it is contended, be investigated by this Court. It is to be remembered however that the appeal from the order of the Court below to this Court lies on questions of fact as well as on questions of law and although, as a rule, this Court will be reluctant to investigate facts for the first time in appeal, yet there is nothing in law to prevent such facts being investigated when the interests of justice so require. The decree which is sought to be executed is for a substantial amount and the appellant should not be allowed to be defeated on a mere technical ground.

The learned advocate for the respondent raises two further contentions. It is said in the first place that as the application for execution which was presented by the appellant to the Subordinate Judge of Cuttack on 31st October 1927, was returned to him by the Subordinate Judge to be re-filed and as it was never presented to the Subordinate Judge again, that application has to be regarded as not being presented at all. The question however to be considered is whether assuming that this application is not an "application made to the proper Court in accordance with law," it may still not be regarded as a step-in-aid of execution. It appears to me that if the Subordinate Judge of Cuttack still retained jurisdiction to execute the decree, the mere fact that an application which was properly made to him was returned by him under a misapprehension will not prevent the making of the application from being

tantamount at least to a step-in-aid of execution.

The second question urged by the learned advocate for the respondent is that as both the Courts at Cuttack and Berhampur appear to have proceeded on the assumption that a certificate under S. 41 had been transmitted by the Cuttack Court after the first execution had been dismissed on part satisfaction, the matter is *res judicata* and cannot be opened again. It is true that it has often been held that orders passed at one stage of the execution may be *res judicata* at a subsequent stage ; but in this particular case the question as to whether a certificate was actually sent under S. 41 by the Subordinate Judge of Cuttack to the Court at Berhampur or not was never specifically raised or decided and I do not think that it is too late yet to investigate it. The fact however that both the Courts have proceeded on the assumption that a certificate under S. 41 had been transmitted on the former occasion may be taken into consideration, if no other evidence is available to show whether a certificate was in fact transmitted or not. In my opinion the best course would be to send the case back to the lower Court in order to enable it to come to a final decision after ascertaining whether a certificate as required by S. 41, Civil P. C., had already been transmitted to the Court of Berhampur or not.

It may be mentioned here that in the Register of Execution Cases there is a note in the remarks column that an intimation was sent on 3rd January 1924, to the Court of Berhampur. The question however remains as to whether the intimation referred to in the Register was the same as a certificate required by S. 41, Civil P. C. I would therefore set aside the order of the Court below and remand the case to that Court for disposal according to law in the light of the remarks made above. Both the parties will be allowed to offer evidence which will be confined only to the question of certificate. Costs will abide the result.

Macpherson, J.—I agree.

K.N./R.K.

Appeal allowed.

(3) [1909] 1 I. C. 57.

(4) A.I.R. 1923 Bom. 396=74 I. C. 149.

(5) A.I.R. 1926 Pat. 274=94 I. C. 36=5 Pat. 398.

* A. I. R. 1932 Patna 289

Special Bench

COURTNEY-TERRELL, C. J., FAZL ALI
AND AGARWALA, JJ.

B, a Pleader, and M, a Mukhtar, Samastipur, In the matter of.

Civil References Nos. 6 and 7 of 1931,
Decided on 17th August 1932.

* Legal Practitioners—Standard of honour of mukhtar is same as that of vakil or barrister—Person breaking rules, fabricating documents, giving untrue defence and implicating falsely other persons is not fit to be mukhtar—Legal Practitioners Act (1879), S. 14.

A mukhtar's profession is a laborious one. It is of great public utility. From mukhtars, great qualities are expected and heavy responsibilities are placed upon their shoulders and their reputation should be as jealously guarded by the Courts as those of pleaders or vakils or barristers. A lower standard of honour should not be demanded from them than is demanded, and rightly demanded, from the higher ranks of the profession. Therefore when a mukhtar has been clearly shown first of all to break the professional rules which have been laid down, and, secondly, who attempts surreptitiously to alter documents in the case with a view to covering up his faults and comes to the Court with a story which is manifestly untrue, and lastly who attacks reputable persons with the suggestion that they have committed perjury and are setting up a false case against him, that man is no longer fit to remain a member of this profession.

[P 291 C 2]

B. N. Mitter, K. N. Moitra and Murari Prasad—for Pleaders.

Govt. Advocate—for the Crown.

Courtney-Terrell, C. J.—These are references by the District Judge of Darbhanga under the Legal Practitioners Act in the case of a pleader and of a mukhtar respectively. I may say at once that the pleader has given an entirely satisfactory explanation of the circumstances which appeared against him and he has made it clear that no blame attaches to his conduct in the matter. It is otherwise with the mukhtar. The circumstances which have given rise to the references began with a Small Cause Court suit in the year 1926 in which the plaintiff was one Jugdeo and the defendant was one Raudi Potedar. That suit was compromised. The compromise does not seem to have been effective and a second suit was begun in the Court of the Second Munsif by the same plaintiff against the same defendant. The suit was filed on 31st August 1929, but there was a deficit in the court-fee and on the 6th of the following month the deficit was made good and 6th November 1929 was fixed for the settlement of issues in the case. The de-

fendant did not appear and an order was made by the Court that notice should be given to him by registered post, and a month later, 6th December 1929, was fixed for the settlement of the issues. Both the pleader and the mukhtar concerned had appeared for the defendant in the earlier litigation and it appears that the pleader has on several occasions been instructed by this mukhtar. On 6th December 1929, the day fixed for the settlement of issues, a vakalatnama was filed by which the pleader was appointed to act in the fresh litigation for the lay client. The circumstances which led up to the filing of that vakalatnama have been satisfactorily established.

It appears that the pleader received a call by the mukhtar and took instructions from him and a vakalatnama form was filled up by the pleader's clerk. It was signed by the defendant who appears to have accompanied the mukhtar on this occasion, or it appears to have been sent by the defendant in the suit with the mukhtar, and the vakalatnama bears the endorsement "Received from M mukhtar for the defendant." In the inquiry which was ultimately made the pleader, the mukhtar and the defendant respectively offered their accounts of what had taken place on the occasion of the delivery of the vakalatnama and there is no doubt whatever in my mind that the story told by the pleader is the true story. The mukhtar denies that he went to the pleader on that occasion at all. That is in my opinion absolutely and utterly untrue. On 2nd January 1930 there was a petition by the defendant praying for time on the ground that all the papers were in the possession of the mukhtar, and on 21st February there was a petition for time filed bearing a stamp which carries the name of the mukhtar on it. On 24th February 1930 one rupee was deposited with the nazir for the witness's diet money and the receipt which was granted for the money was made out by the nazir stating that the money had been deposited by the mukhtar on behalf of the client.

The counterfoil of the receipt book which has remained in the possession of the Court contains a similar entry, but the receipt which was issued on that occasion has been produced and it has been altered to read in this way: "Received from" (here follows the name of

another pleader altogether) "on behalf of the defendant, the sum of one rupee for diet money." There is also kept in the nazir's office a peremptory cash book and the entries in that book are supposed to correspond with the receipts which are issued by the nazir for money deposited. There are two consecutive entries in that cash book: the first is No. 3197 and originally read under the head of "From whom received" the name "*M* for defendant." Then follows the name of the suit and in another column the amount received. That entry "*M* for defendant" has also been altered so as to give the name of the pleader mentioned in the alteration of the receipt as the person paying the money on behalf of the defendant.

The story of the mukhtar is this: He says that the original deposit must have been made by some person or other, whom he does not suggest, and that the person so depositing the money had wrongly and without authority stated that the deposit was made by the mukhtar and when he became aware of this fact, knowing that at the time he did not have a vakalatnama from the defendant, he went to the nazir and explained to him that there had been a mistake and that the nazir had corrected the entry. The nazir's story, on the other hand, is that the original deposit had in fact been made by the mukhtar and he admits that it is true that the mukhtar subsequently came to him and asked him to make the necessary alteration giving what he (the nazir) considered at the time was a satisfactory reason for the alteration and it is possible, and indeed probable, although the direct fact has not been elicited, that the mukhtar stated to the nazir that he had in fact no mukhtarnama at the time he made this deposit and wanted to have the matter put right. But the second entry in the peremptory cash book which is No. 3198 which must have been made immediately subsequent to the entry 3197 relates to another suit altogether.

It also contains an entry of a deposit of Rs. 5 in respect of witnesses expenses and in the column which should state the name of the person depositing is written the abbreviation "do." indicating that the person who made the deposit is the same person as the person who

made the deposit in the case of the entry 3197.

Now it has been made quite manifest that the pleader whose name has been substituted for that of *M* in the case of the first entry cannot possibly have made the payment recorded in the next entry 3198. Indeed the person who had effected the alteration in entry 3197 could hardly have intended to represent that the pleader had made the deposit in the case of the second entry because that pleader was in fact engaged in the second case on behalf of the other side. The omission to alter the entry 3198 so as to contain the name "*M*" instead of the word "do." seems to have been an oversight on the part of *M* but it has this important bearing on the case: that it indicates that the person who was responsible for making the deposit recorded in 3197 was in fact *M* because *M* had in fact made the deposit recorded in entry 3198 and therefore if the explanation given by *M* for the deposit having been made in his name in the suit of *Jugdeo v. Raudi Potedar* be true it is a most singular occurrence that that entirely unauthorized entry should have immediately preceded, evidently within, a few minutes a genuine entry by *M* under the heading 3198.

We have further evidence that *M* was acting in fact as the mukhtar of the defendant throughout this period. On 23rd June a list of documents was prepared which list bears the name of *M*, but the date 26th June 1930 has been struck out and for it has been substituted the date "18th August 1930". This list was in fact filed on 18th August 1930 which is the same date upon which a mukhtar-nama was actually filed purporting to authorize *M* to act as mukhtar for the defendant. Some investigation seems to have been set on foot in the office of the Munsif. How that investigation originated we do not know, but notice was served upon the pleader on 27th August 1930 to show cause why his conduct should not be reported to the High Court for that he had accepted a vakalatnama from the mukhtar, the mukhtar being unauthorized to deliver a vakalatnama; and notice was also served upon the mukhtar to show cause why he had been acting as a mukhtar in delivering the vakalatnama without being so authorized; and 16th September 1930 was fixed as the date

when the two persons concerned should show cause. It was at that stage that the mukhtar put in his explanation in the form of a letter stating that he had not employed the pleader at all and also stating that he had not acted as a mukhtar for the defendant in the course of that litigation. The pleader also put in a petition in which he denied the mukhtar's story and the Munsif investigating the matter came to the conclusion that there was little cause of complaint against the parties in question, but he sent the papers to the District Judge. The District Judge sent the matter back to the Munsif for a further investigation and particularly for the purpose of explaining the entries in the cash book and in the receipt and it must have been perfectly obvious to the mukhtar that in such circumstances an explanation would be called for from him and from the nazir. The nazir gave evidence and stated that the mukhtar had come to him in circumstances which I have already narrated and asked for the alteration of the entries in regard to the deposits which the mukhtar had personally made to him (the nazir). The mukhtar thereupon cross-examined the nazir first of all in order to try and shake his memory as to the particular circumstances and to show that he could not really remember whether the person making the deposit was the mukhtar himself or some one else representing that he was acting on behalf of the mukhtar, but the witness was quite positive about the matter; and then the mukhtar had the impudence to suggest to the nazir that he was a party to a false case that was being made against him at the instance of the pleaders of that place. It must be remembered also that the mukhtar had already expressly denied the story told by the pleader and also appears to have influenced the defendant himself to set up an absolutely impossible story.

We have it therefore clearly established that the mukhtar was in fact acting as a mukhtar on behalf of the defendant in the case without filing a mukhtarnama. That in itself would have been an offence it is true against the rules which have been made for the good of the public and which must be obeyed, but it was a relatively trifling offence which was capable of simple adjustment. But he went further and had the altera-

tions made in the receipt and in the peremptory cash book with a view to deceiving the Court and covering his traces. That in itself again though an offence and a relatively serious offence is one which might have been passed over or met with a comparatively lenient punishment had the mukhtar only had the honesty to come forward and state the facts of the matter. He did not do that. He told first of all a completely untrue story and then he accused the pleader of perjury and accused the nazir not only of perjury but of being a party to a plot to set up a false case at the instance of envious pleaders. That combination of circumstances which has been demonstrated to our complete satisfaction by the evidence is brought to our notice in order that we may consider what should be the proper means of dealing with a man of this type. A mukhtar's profession is a laborious one. It is of great public utility. From mukhtars great qualities are expected and heavy responsibilities are placed upon their shoulders and at any rate from my experience of mukhtars I have met I may say that those I have met have appeared to me, however humble their relative position in the legal hierarchy may be, as men who endeavour to do their duty honestly and fearlessly and their reputation should be as jealously guarded by the Courts as those of pleaders or vakils or barristers. I would on their behalf resent the suggestion that a lower standard of honour should be demanded from them than is demanded, and rightly demanded, from the higher ranks of the profession. Therefore when we have a man who has been clearly shown first of all to break the professional rules which have been laid down, and secondly who attempts surreptitiously to alter documents in the case with a view to covering up his faults and comes to the Court with a story which is manifestly untrue and lastly who attacks reputable persons with the suggestion that they have committed perjury and are setting up a false case against him, we can but conclude that that man is no longer fit to remain a member of this profession. I would therefore direct that his name be removed from the roll of mukhtars.

Fazl Ali, J.—I agree.

Agarwala, J.—I agree.

M.N./R.K.

Order accordingly.

* * A. I. R. 1932 Patna 292

Special Bench

COURTNEY-TERRELL, C. J., FAZL ALI
AND AGARWALA, JJ.

Rajendra Prasad Missir and others—
Petitioners.

v.

Emperor—Opposite Party.

Criminal Refs. Nos. 18 and 19 of 1932
and Criminal Revn. No. 251 of 1932,
Decided on 19th August 1932, reference
made by Sess. Judge, Darbhanga, in his
letters Nos. 665-Cr., and 690-Cr., D/-
12th/14th and 14th April 1932.

**** Criminal P. C. (1898), S. 386 (1) (a) —
Undivided share in moveable property cannot be seized.**

There is no method by which the undivided
share of an individual in moveable property can
be seized in the liberal physical sense, without
at the same time seizing the undivided shares of
other persons, and as the statute does not authorize
the seizure of such other shares the undivided
share of an individual such as a member of a
joint Hindu family cannot be seized under
S. 386 (1) (a) : 20 Cal. 478, Rel. on. [P 293 C 1]

*Harnarayan Prasad, Baldeo Sahay,
B. N. Mitter and B. P. Jamuar — for*
Petitioners.

Asst. Govt. Advocate — for the Crown.

Judgment.—The facts giving rise to
Criminal Reference No. 18 of 1932 were
as follows: One Ramnandan Missir was
convicted under Ss. 143 and 188, I. P. C.,
and under S. 17 (2), Criminal Law Amendment
Act. Under the latter section
he was sentenced to 18 months' rigorous
imprisonment. Under each of the Ss. 143
and 188, I. P. C., he was sentenced to a
month's rigorous imprisonment and a
fine of Rs. 50. The fine was not paid,
with the result that a warrant was
issued for its realization. In execution
of the warrant a buffalo and three chairs
which were found on the premises occupied
by Rajendra Prasad Missir, father
of Ramnandan Missir, were seized.
Thereafter Rajendra Prasad Missir appeared
before the Magistrate who had
issued the warrant and claimed the
attached buffalo and chairs, alleging that
they belonged not to Ramnandan but to
the joint family of which he and the
petitioner were members. Rajendra
Prasad's objection to the attachment was
overruled.

In Criminal Reference No. 19 of 1932
one Maheshkant Chaudhry was convicted
under S. 17, Criminal Law Amendment
Act and sentenced to pay a fine of Rs. 50.
The fine not having been paid, a warrant

of attachment was issued, and in execution
of the warrant 25 maunds of paddy,
three maunds of marua and certain other
articles were seized. Thereupon Deonara-
rain Chaudhry, father of Maheshkant,
appeared before the Magistrate who had
issued the warrant, and objected to the
seizure. He claimed that the grain and
other articles seized belonged to the
joint family of which he and his son were
members and that they were not the
exclusive properties of his son. The objection
was overruled by the Magistrate.
The Sessions Judge of Darbhanga has
referred both these cases to the High
Court under S. 438, Criminal P. C. In
the opinion of the Sessions Judge the
property of the joint family was not
attachable in either case in execution of
the warrants that were issued, and he
therefore recommended that the things
seized should in both cases be released
from attachment. The question for decision
in Criminal Revision No. 251 of
1932 is precisely the same.

In all these cases the Magistrates who
issued the warrants elected to adopt the
procedure provided in S. 386 (1) (a), i. e.,
they issued in each case, a warrant for
the levy of the amount of the fine by
attachment and sale of the moveable property
belonging to the offender and the
objections in all the cases are that moveable
property not belonging to the offender
has been seized in execution of the
warrant. S. 386 (1) (a) does not authorize
the attachment of any property
other than the moveable property belonging
to the offender and the question
therefore arises: in what manner can the
moveable property of an offender be attached
under that clause when the only
moveable property of the offender is an
undivided share in the moveable property
of the joint family of which he is
a member? It is to be observed that
sub-S. 2, S. 386, empowers the Local
Government to make rules regulating the
manner in which warrants under sub-
S. (1) (a) are to be executed. We have
been unable to ascertain that any rules
have been made under this subsection.
Assuming that an undivided share in the
moveable property of a joint family may
"belong" to an individual member of the
family, the assumption premises that
other undivided shares belong to other
members and I can find nothing in
S. 386 (1) (a) which authorizes the at-

tachment of those shares. What has been done in the present cases is that things in which the respective offenders as well as others have undivided shares have been physically seized in execution of the warrants that were issued. If this amounts to a legal attachment of the shares in those things of the respective offenders, it is also an attachment of the shares of others for which there is no warrant and which is not authorized by the statute. That seizure is not the proper method by which to reach an undivided share was pointed out by the Privy Council as long ago as 1871 in *Syud Tuffuzzool Hossein Khan v. Raghoonath Pershad* (1) (at p. 50).

In that case, under a remit from the Privy Council to the Court of first instance, to refer to arbitration the accounts of a partnership firm, a reference was duly made to arbitrators. Before any award was made the rights and interests of one of the parties were sold by Court in execution of a decree against him in another Court by a third party. The question before the Privy Council was whether the expectant claim under an inchoate award was "property" within the meaning of S. 205, Civil P. C., of 1859, so as to be saleable in execution of a decree. In support of the view that the sale was valid it was argued that the case was analogous to the sale of an undivided share in a joint Hindu family, the contention being that such an undivided share was "property" and was saleable in execution of a decree. The judgment of the Privy Council was delivered by James, L. J., who said :

"No doubt can be entertained that such a share is property and that a decree-holder can reach it. It is specific, existing and definite ; but it is not properly the subject of seizure under this particular process"

(i. e., a writ of attachment issued under S. 205, Civil P. C., of 1859). We can conceive of no method by which the undivided share of an individual in moveable property can be seized in the literal physical sense, without at the same time seizing the undivided shares of other persons, and as the statute does not authorize the seizure of such other shares we are driven to the conclusion that the undivided share of an individual cannot be seized under S. 386 (1) (a). This was also the conclusion reached by Pigot and

Hill, JJ., in *Queen-Empress v. Sita Nath Mitra* (2). It is perhaps not without significance that although that case was decided in 1892, the legislature, when amending S. 386 in 1923, left that decision untouched. In each of these cases therefore the property attached will be released.

M.N./R.K.

Reference accepted.

(2) [1893] 20 Cal. 478.

* * A. I. R. 1932 Patna 293 Special Bench

COURTNEY-TERRELL, C. J., FAZL ALI
AND AGARWALA, JJ.

Radha Kishun Marwari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 206 of 1932, Decided on 2nd September 1932, against order of Sess. Judge, Monghyr, D/- 10th February 1932.

* (a) **Interpretation of Statutes—Object of legislature is immaterial unless it is stated to be guiding principle in interpretation.**

Courts of justice are not concerned with the objects with which the legislature enacts any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation. It may well be that the promoters of any particular bill in the legislature may have particular objects in view but any section as ultimately enacted may well be the result of the compromise and it may be that the words ultimately agreed upon have been passed by the legislature in such a form that one or all of the objects of the promoters is defeated. In cases therefore where the legislature has not thought fit to express its intention otherwise than by the use of the words of the section those words must be followed. [P 295 C 1]

* * (b) **Evidence Act (1872), S. 25—S. 25 applies to Police Officer alone and not person invested with powers of Police Officer for limited purpose—Confession made to Excise Inspector with power to search and investigate is admissible.**

The distinction between a person who is nothing but a Police Officer and one who is primarily not a Police Officer but merely invested with the powers of a Police Officer is material and cannot be ignored for the purpose of construing S. 25. [P 296 C 1]

Section 25 was intended to apply to Police Officers and Police Officers alone and if the framers of the Act did not have in view at the time of framing the section any class of persons other than the Police Officers, Court cannot read the term "Police Officers" as including men who are provisionally and for a limited purpose only invested with some of the powers of Police Officers. [P 297 C 1]

A confession made before an Excise Inspector who under the Dangerous Drugs Act (2 of 1930) not only has the power to arrest and search but has also been invested by the Local Government

(1) [1886-87] 14 M. I. A. 40=7 B. L. R. 186=2 Suther. 434=2 Sar. 656 (P.C.).

with the powers of an officer in charge of a police station for the investigation of an offence under that particular Act is admissible in evidence : *A.I.R.* 1927 *Bom.* 4 (F. B.) and *A.I.R.* 1931 *Cal.* 350, not *Foll.*; 1 *Cal.* 207, *Expl. Case law referred.* [P 295 C 2]

* (c) Evidence Act (1872), S. 25—"Police Officer" means what is popularly and technically known as member of police force.

The term "Police Officer" has not been defined anywhere but there can be no doubt that S. 1, Police Act, is not exhaustive and the term is wide enough to include not only the persons enrolled under the Police Act, but also such persons as the Police Officers of the Indian States and possibly a police patel of the Bombay Presidency. The term "Police Officer" should not be read in any technical sense but in its more popular and comprehensive meaning, which connotes nothing more or less than a "member of the police force;" 1 *Cal.* 207, *Rel. on.*

[P 296 C 1]

N. Imam and *K. K. Banerji*—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Courtney-Terrell, C. J.—The question for decision in this case is whether an Inspector of Excise acting in the course of his duties is a "Police Officer" within the meaning of S. 25, Evidence Act, and whether a confession made to him is admissible. The trend of the decisions in Bengal, with one exception to which I shall refer has been to answer this question in the negative but a difficulty has arisen owing to a judgment of a Full Bench of the Bombay High Court in the case of *Nanoo Sheikh Ahmed v. Emperor* (1) in which the learned Judges arrived at the opposite conclusion. With the greatest respect to the Bombay High Court I find myself in complete disagreement with the arguments which found favour in that case and have been presented before us and I think the fallacy is attributable to two causes. In the first place a judgment of Sir Richard Garth in the case of *The Queen v Huribole Chunder Ghose* (2) has been misunderstood and this misunderstanding has been the source of frequent error. The facts in that case were of a very simple character. The Deputy Commissioner of Police for Calcutta who was also a Magistrate had issued a warrant for the arrest of the accused Huribole. He was brought before the Deputy Commissioner at his private residence over the Police Office and there made a confession in the presence of the

Deputy Commissioner and of two Inspectors of Police. One of the said Inspectors reduced the confession to writing and it was signed and acknowledged by Huribole as correct in their presence. It was argued that the Deputy Commissioner was not a member of the Calcutta police force. It was admitted that he was a Police Officer but although a Superintendent of Police in the mofussil he was a Deputy Commissioner only in Calcutta where the confession was recorded and the confession was recorded before him as a Magistrate. The Court held that although the Deputy Commissioner of Police in Calcutta was not a member of the police force within the meaning of Bengal Act (4 of 1866) that he was nevertheless a Police Officer quite as much as the more ordinary members of the force. In other words Sir Richard Garth held that the term "Police Officer" in the Evidence Act, included all Police Officers and not merely a member of the police force within the meaning of the Bengal Act. He said :

"I consider that the term "Police Officer" should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words, "Police Officers" quite as much as the more ordinary members of the force, and although in the case of a gentleman in Mr. Lambert's position there would not be of course the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe its widest and most popular signification"

This very sound decision that the term "Police Officer" in S. 25, Evidence Act, includes all kinds of Police Officers has been misunderstood as a decision that the term includes not only Police Officers but any one on whom is conferred the powers of a Police Officer, although it has nowhere been decided what minimum aggregation of functions will constitute any person a police officer within the meaning of the section. The fact is that the term "police officer" is sufficiently well understood to allow of its use without any precise definition. Thus it is well recognized that different countries and States confer upon their respective

(1) *A. I. R.* 1927 *Bom.* 4=99 *I. C.* 330=28 *Cr. L. J.* 122=51 *Bom.* 78 (F.B.).

(2) [1876] 1 *Cal.* 207=25 *W. R.* 86.

police officers different powers. Nevertheless it is not difficult to decide whether any particular individual is, or is not, a police officer in any particular country and it has been held that a confession made to a police officer of a foreign force in the country where he is in fact a police officer is not admissible in an Indian trial.

Another source is the adoption of an erroneous canon of construction of statutes, that is, the consideration of what is supposed to be the object of this section of the Evidence Act and the adoption as an initial hypothesis of the theory that that object was to make inadmissible confessions made before persons possessing the power of investigation, search and arrest so that whereas a Sub-Inspector of Excise had been given these functions he came within the term "police officer." Now in the first place Courts of justice are not concerned with the objects with which the legislature enacts any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation. It may well be that the promoters of any particular bill in the legislature may have particular objects in view, but any section as ultimately enacted may well be the result of compromise and it may be that the words ultimately agreed upon have been passed by the legislature in such a form that one or all of the objects of the promoters is defeated. In cases therefore where the legislature has not thought fit to express its intention otherwise than by the use of the words of the section those words must be followed.

There is one case, that of *Ibrahim Ahmad v. Emperor* (3), in which a Bench of the Calcutta High Court, while affirming a conviction upon other grounds, excluded a confession made to an excise officer on the basis of the Bombay decision; but strangely enough notwithstanding the former decisions of the Calcutta High Court, the question was not referred to a Full Bench. The decision has been treated as obiter dictum in a subsequent case before the same Court and in any case it contains what I consider to be the same errors apparent in the Bombay decision. Indeed the lear-

ned Judge who delivered the opinion of the Bench introduced a curious test which I have not seen suggested in any other case. He said :

"On principle also, the position of a police officer cannot be distinguished from that of an excise officer, with regard to an offence under the Excise Act, because an excise officer is also interested in the conviction of the accused and in a position to dominate him. Outwardly also there is hardly anything to distinguish the one class of officers from the other, for they wear uniforms which are not dissimilar and take part in the investigation in the same way."

In other words the learned Judge suggests that if a man looks like a police officer then he is a police officer according to law. The position of persons in authority who are not police officers is amply dealt with by S. 24. Such persons, for example as Magistrates and those deputed by Magistrates under S. 202, Criminal P. C., to inquire into complaints, these have many of the powers of police officers, but certainly are not police officers in any accepted sense, and are not affected by S. 25, Evidence Act.

It is unnecessary to consider the numerous cases cited in the course of the argument. The question is really a simple one. The confession in this particular case which is, in my opinion, admissible is sufficient to justify the conviction and I would reject the petition for revision.

Fazl Ali, J.—I agree. The question to be decided in this case is whether a confession made before an Excise Inspector who under the Dangerous Drugs Act (2 of 1930) not only has the power to arrest and search but has also been invested by the Local Government with the powers of an officer in charge of a police station for the investigation of an offence under that particular Act is admissible in evidence. The view which prevails in the Calcutta High Court is that a confession made before an excise officer is admissible : see *Rukumali v. Emperor* (4), *Ah Foong Chinaman v. Emperor* (5), *Harbhanjan Sao v. Emperor* (6) and *Matilal Kalowar v. Emperor* (7). A Full Bench of the Bombay High Court has however decided that an abkari officer who exercises the powers conferred by the Code of Crimi-

(4) [1918] 19 Cr. L. J. 524=45 I. C. 284.

(5) [1918] 46 Cal. 411 = 20 Cr. L. J. 94 = 48 I. C. 504.

(6) A. I. R. 1927 Cal. 527 = 102 I. C. 547=28 C. L. J. 579=54 Cal. 601.

(7) A. I. R. 1932 Cal. 122=1932 Cr. C. 107.

(3) A. I. R. 1931 Cal. 350=(1931) Cr. C. 414=131 I. C. 113=32 Cr. L. J. 640=58 Cal. 1260.

nal Procedure on an officer in charge of a police station for the investigation of a cognizable offence is a police officer within the meaning of S. 25, Evidence Act, and any confession made to such an officer in course of his investigation under the Abkari Act or the Code of Criminal Procedure is inadmissible in evidence. In view of this decision which represents the views of no less than five eminent Judges of the Bombay High Court and is undoubtedly entitled to great weight it becomes necessary to examine the question before us with care.

The term "police officer" has not been defined anywhere, but there can be no doubt that S. 1, Police Act, is not exhaustive and the term is wide enough to include not only the persons enrolled under the Police Act, but also such persons as the police officers of the Indian States and possibly a police patel of the Bombay Presidency. It seems to be now well settled that as was pointed out in *Queen Empress v. Haribole Chandra Ghosh* (2) the term "police officer" should not be read in any technical sense but in its more popular and comprehensive meaning. In its popular meaning a police officer is certainly a different person from a revenue officer, and it was conceded before us in course of the argument that an excise officer is primarily a revenue officer and not a police officer. It is however contended that a confession made before him would be inadmissible, because he is vested by law with the powers of a police officer for certain purposes. It appears to me that the distinction between a person who is nothing but a police officer and one who is primarily not a police officer but merely invested with the powers of a police officer is material and cannot be ignored for the purpose of construing S. 25, Evidence Act. It may be noticed that it is not only certain revenue officers such as officers of the excise and salt departments who are sometimes invested with the powers of a police officer in charge of a police station, but a private individual may also under certain circumstances be invested with such powers; for instance under S. 202, Criminal P. C., if an inquiry or investigation under that section is delegated to a private person, such person is to exercise all the powers conferred by the Code of Criminal Procedure on an officer in charge of the police

station except that he is not to have the powers to arrest without warrant.

Are we then to suppose that such a private individual should also be regarded as a police officer within the meaning of S. 25, Evidence Act? To take this view would, in my opinion, be to ignore the popular meaning of the term "police officer" and enlarge unduly the scope of the section. There was nothing to prevent the framers of the Evidence Act from saying expressly that confessions made to a police officer as well as those persons who are for the time being and for certain limited purposes invested with the powers of a police officer are inadmissible in evidence. The section however is limited merely to a police officer and we cannot read into it words which it does not contain. In the Evidence Act itself the terms "police officer" and "revenue officer" have been used to connote two different classes of officers as is evident on reading S. 125 of the Act. It is true that S. 125, Evidence Act, was inserted in the Act subsequently, but that should not in my opinion make any difference, as both the sections are now part of the same Act and we cannot construe certain words used in one section in one way and the same words as used in the other in a different way.

It is argued before us, and apparently this was also one of the arguments used before the Full Bench of the Bombay High Court, that the object of S. 25, Evidence Act, must have been to prevent the police officers in this country from abusing their extensive powers in extorting confessions from persons in their custody and as there are the some possibilities of evil when an excise officer investigates a case, S. 25 should be extended to include such an officer also. There is however nothing before us to lead us to suppose that in enacting S. 25 the framers of the Evidence Act had any other class of officers in view than the police officers as they are understood in popular language and we cannot extend the provisions of that section merely because we feel that it should have been wide enough to cover all persons, whether they be police officers or not who are in a position to extort a confession from an accused person. It appears to me that it is one thing to say that it is desirable to have a certain provision in the Evidence

Act and another that such a provision already exists.

The matter may be looked at from another point of view. What seems to have greatly weighed with the learned Judges of the Bombay High Court was that in the particular case which they had before them the abkari officer had the power to investigate like a police officer in charge of a police station. But is that to be the real test for excluding a confession? A police constable has generally no power to investigate a criminal offence but nevertheless a confession made before him would be inadmissible because he is a police officer. Such would also be the case if a confession is made before a police officer who though invested with the powers of investigation within his own jurisdiction is not engaged in the particular investigation in the course of which the confession is made. Again if a confession is to be made inadmissible merely because the person before whom it is made is in a position to extort it from the accused, why should not S. 25 be extended to those persons who have the power to arrest and detain an accused person for some time and yet have not the power to investigate the offence with which he is charged? Thus once it is held that S. 25 refers not only to those who are popularly known as police officers but also to persons who have certain powers ordinarily exercisable by a police officer, it becomes material to consider what is the minimum power or powers to be exercised by such persons so as to make S. 25 applicable of being answered in more than one way and this fact by itself would introduce an element of great uncertainty and confusion in administering the law.

As I have already indicated the question is not altogether free from difficulty, but the view that I have formed on a consideration of the numerous authorities cited before us is that S. 25 was intended to apply to police officers and police officers alone and that if the framers of the Act did not have in view, at the time of framing the section any class of persons other than the police officers, we cannot read the term "police officers" as including men who are provisionally and for a limited purpose only invested with some of the powers of police officers. Under the Evidence Act as it stands S. 25 and S. 24 are to be read together

both being exceptions to the general rule laid down in S. 21 that admissions may be proved as against the person who makes them. S. 25 was intended to apply to police officers and must be applied to police officers alone. S. 24 relates to a confession made before any person in authority provided that the confession appears to have been caused by any inducement, threat or promise, having reference to the charge against the accused person.

The framers of the Evidence Act were therefore not unmindful of those cases in which a confession made before a person other than a police officer may have to be excluded from evidence. It is contended that at the time when the Evidence Act was framed excise officers had not the powers which are now conferred upon them. But this appears to me to support the view that the framers of the Evidence Act could not have intended that a confession made before an excise officer should be made inadmissible. The language used in S. 25 is so comprehensive that it covers not only the police officers of smaller rank but also police officers of the highest rank who cannot be suspected of using any unfair means for the purpose of extorting a confession. This also would go to show that the real test is not merely whether a person is in a position to abuse his powers but whether he is really a police officer or not. On the whole therefore I am inclined to follow those decisions of the Calcutta High Court where it has been held that a confession made before an excise officer is admissible and respectfully differ from the view taken in *Nanoo Sheikh Ahmad v. Emperor* (1). I have refrained from referring to the case of *Ibrahim Ahmad v. King-Emperor* (3), which is the only case of the Calcutta High Court in which a discordant note was struck and it was suggested that a confession made before an excise officer during investigation was inadmissible in evidence. The learned Judges who decided that case did not refer the matter to a Full Bench and their view did not find favour with another Division Bench of the Calcutta High Court in a later case, *Mati Lal Kalwar v. Emperor* (7).

Agarwala, J.—The petitioner has been convicted under S. 14 (a), Dangerous Drugs Act, 1930, and sentenced to rigorous imprisonment for a year and a fine of Rs. 100. On a pre-

vious occasion he was convicted and sentenced for an offence under S. 47 (a), Bihar and Orissa Excise Act, 1915. On the present occasion the petitioner was arrested by an Inspector of Excise at the Purabsarai Railway Station while alighting from a train from Calcutta. When the Inspector announced his intention of searching the person of the petitioner, the latter untied a handkerchief which was wound round his thigh and produced therefrom a paper packet saying that it contained cocaine. A search list was immediately prepared by the Inspector and signed by the persons whom he had produced for the purpose of witnessing the search. The petitioner wrote on the search list an endorsement to the effect that the packet had been recovered from him and contained cocaine worth Rs. 100 and signed the endorsement. The Inspector sealed the packet in the presence of the search witnesses. Unfortunately the contents of the packet have not been analyzed by the Chemical Examiner. The Inspector's explanation with regard to this is that owing to pressure of work he put it in a box at his residence which was stolen before he was able to send the packet for analysis. At the trial therefore the only evidence that the packet contained cocaine was the statement of the accused made to the Inspector at the time of his arrest. The defence objected to the admissibility of this evidence, but the objection was overruled. At the trial the defence of the accused was that the packet contained boric powder and not cocaine. In his examination under S. 342 he admitted having made the endorsement on the search list, but in a written statement, which he filed subsequently, he said that the endorsement had not been made voluntarily. It has not been contended before us that the admission made to the Magistrate that the accused made the endorsement on the search list amounts to an admission that the packet contained cocaine.

In revision the petitioner contends that the evidence on which the prosecution relied to prove the contents of the packet in this case was inadmissible by reason of S. 25, Evidence Act, which renders inadmissible a confession made to a police officer. It is contended that the Excise Inspector is a "police officer" within the meaning of that section. The argument in support of this proposition

is of a twofold nature. In the first place it is urged, on the authority of an observation in *Queen v. Hurribole Chunder Ghose* (2) and on certain observations in cases which have followed that decision, that the terms "police officer" in S. 25 should be construed in its widest and popular sense, and that in this sense, "police officer" connotes any person possessing some of the attributes of a police officer and popularly supposed to be a police officer. The second branch of the argument is that an Excise Inspector, by reason of the powers conferred on him, is in fact a police officer while exercising those powers. In the case reported in *Queen v. Hurribole Chunder Ghose* (2), the prosecution sought to put in evidence a confession made by the accused to the Deputy Commissioner of Police at the police office and recorded by police officer and attested by the Deputy Commissioner of Police in his capacity of a Magistrate. It was contended on behalf of the accused that the Deputy Commissioner of Police was a police officer and that a confession made to a police officer under any circumstances is inadmissible in evidence. With the latter part of this contention the learned Judges, Garth, C. J., and Pontifex, J., agreed. Garth, C. J., however held that the Deputy Commissioner of Police was not a police officer within the meaning of the Calcutta Police Act, 1866. With regard to S. 25, Evidence Act however he said:

"But in construing S. 25, Evidence Act, 1872 I consider that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning."

Speaking for myself I should have thought that in its popular sense the term "police officer" connotes nothing more or less than a "member of the police force," and I do not think that the observation of Garth, C. J., was intended to go beyond that. It is true that the learned Judges who decided the case reported in *Queen v. Hurribole Chunder Ghose* (2), considered that the Deputy Commissioner of Police was not technically a member of the police force. But the officer whose status was there being considered, if not enrolled in or appointed to the force recruited under the Calcutta Police Act, was at least a person who, by a notification in the Calcutta Gazette of 24th July 1872, had been appointed as

Superintendent of Police in the moffusil, and it may well be that when a person is a Superintendent of Police in one part of the Province and is appointed as a Deputy Commissioner in another part of the Province that he may popularly be supposed to be a police officer. I do not think that Garth, C. J., ever intended that a person totally unconnected with the police force is a police officer within the meaning of S. 25 merely because he is popularly supposed to be a police officer. The officer to whom the confession was made in the present case is in no way connected with the police force. He is an officer of the Excise Department and in my opinion no popular misconception as to his status can suffice to make him police officer within the meaning of S. 25.

A number of later cases have been referred to at the Bar, in which the learned Judges who decided these cases have purported to base their decisions on the observations of Garth, C. J., quoted above. With great respect to those learned Judges I am unable to agree that the observations of Garth, C. J., go further than I have indicated above. In particular reference was made to the decision in *Queen-Empress v. Saleemuddin Sheikh* (8), in which the observation of Garth, C. J., was quoted and in which it was held that a confession made to a chowkidar is excluded by S. 25. In the judgment of that case no reference is made to an earlier decision by a Division Bench of the same Court in *Queen-Empress v. Bepin Behari Dey* (9), that S. 25 does not exclude a confession made to a chaukidar. The conflict of judicial opinion in the Calcutta High Court on this point was commented on in *Nazir Jharudar v. Emperor* (10). S. 47, Police Act, 1861 empowers the Local Government to declare that:

"an authority which now is or may be exercised by the Magistrate of the district over any village-watchman or other village police officer for the purposes of police, shall be exercised subject to the control of the Magistrate of the district, by the District Superintendent of Police,"

and at least with respect to some of the districts in this Province such a declaration has been made (vide B. & O. Statutory Rules and Orders). But para. (1), S. 21 of the Act, provides as follows:

(8) [1899] 25 Cal. 569=3 C. W. N. 393.

(9) [1898] 2 C. W. N. 71.

(10) [1905] 9 C. W. N. 474=2 Cr. L. J. 255.

"Nothing in this Act shall affect any hereditary or other village police officer, unless such officer shall be enrolled as a police officer under this Act. When so enrolled, such officer shall be bound by the provisions of the last preceding section. No hereditary or other village police officer shall be enrolled without his consent and the consent of those who have the right of nomination."

This appears to me to make it quite clear that a village police officer, even in a district in respect of which a declaration has been made under S. 47, cannot be enrolled in the police force without his own consent and the consent of those who have the right of nomination, and that until so enrolled, he is not a member of the police force any more than an ordinary private individual is a member of that force unless and until he volunteers for appointment and is appointed under S. 7 or is appointed to be a special constable under S. 17. I do not understand how a person can be said to be a police officer within the meaning of one Act of the legislature when his enrolment in the police force is expressly prohibited by another Act of the legislature, unless the conditions which operate to bar the prohibition exist.

In my opinion no person is a police officer unless he is enrolled in, or appointed a member of, the police force or is declared by statute to be a member of that force. This brings me to the second branch of the contention of the petitioner. It is argued that an Excise Officer is a police officer by reason of the fact that some of the powers of a police officer have been conferred upon him by the Bihar and Orissa Excise Act 1915, and reliance is placed on the decision in *Ibrahim Ahmad v. King-Emperor* (3) and *Nanoo Sheikh Ahmad v. Emperor* (1), where it was held that a confession to an Excise Officer is excluded by S. 25, Evidence Act. In the Calcutta High Court there have been a number of decisions in which the contrary view has been taken, and with those decisions I respectfully agree. It will suffice to mention *Ah Foong v. Emperor* (5), *Harbhanjan Sao v. Emperor* (6) and *Tura Sardar v. Emperor* (11). The Bombay case is a decision of a Full Bench overruling a previous decision of a Division Bench of the same Court. The question referred to the Full Bench of the Bombay High Court was as follows:

(11) A.I.R. 1930 Cal. 710=1930 Cr. C. 1110=32 Cr. L. J. 231.

"Is an Abkari-officer, who in the conduct of investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Code of Criminal Procedure 1898 upon an officer in charge of a police station for the investigation of a cognizable offence, a police officer within the meaning of S. 25, Evidence Act.?"

The Full Bench answers this question in the affirmative. The observations of Garth, C. J., in *Queen v. Hurribole Chunder Ghose* (2) and the decisions in *Queen-Empress v. Salemuddin Sheikh* (9) (*ubi sup*) were quoted with approval. The decision in *Ah Foong v. Emperor* (12) however, was distinguished by Marten, C. J. from the case before the Full Bench on the ground that the powers of Excise Officers in Bombay are far more extensive than in Calcutta. The learned Chief Justice said:

"In Bombay the Opium Act has been expressly amended so as to confer upon abkari officers certain wide police powers, which are very similar to those conferred on them as regards offences under the Abkari Act, e.g., the same powers of investigation as those possessed by an officer in charge of a police station."

If I read the judgment of the learned Chief Justice of Bombay aright, the possession of powers of investigation is, in his opinion, an important element in the constitution of a police officer. Fawcett, J., expressed a similar view in the same case where his Lordship said:

"I think an important fact to be borne in mind is that, prior to the amendment of the Abkari Act by Bombay Act 12 of 1912, an Excise Officer, after arresting a person has forthwith to send him to the nearest police station and the investigation was then conducted by police officers, whereas now, an Excise Officer, if empowered under S. 41 can exercise police powers of investigation which cover a certain amount of detention of the accused while the investigation is going on, so that he has similar opportunities of extorting a confession from an accused. This is an all-important difference which distinguishes this case from that of *Ah Foong v. Emperor* (5), as has been pointed out by my Lord the Chief Justice."

It may be observed, however that there are officers who have no powers of investigation under the Criminal P. C., e. g. police constables, and yet such officers are nevertheless "police officers" within the meaning of S. 25, Evidence Act. The mere possession of certain of the powers of a police officer, even though those powers include the power of investigation under the Code, do not suffice, in my opinion, to convert into a police officer one who has no other claim to that status, e.g., S. 202, Criminal P. C.,

empowers a Magistrate receiving a complaint to direct an inquiry or investigation to be made by any Magistrate subordinate to him or by a police officer, or by such other person as he thinks fit but it is not arguable that if such an investigation is directed to be made by a person other than a police officer, such person would be converted into a police officer even while engaged in making the investigation.

In my view an Excise Officer under the B. & O. Excise Act is not a "police officer" within the meaning of S. 25, Evidence Act. I would therefore dismiss this application.

M.N./R.K. *Application dismissed.*

A. I. R. 1932 Patna 300 Special Bench

COURTNEY-TERRELL, C. J. FAZL ALI
AND AGARWALA, JJ.

D, a Pleader, In the matter of.

Civil Ref. No. 1 of 1932, Decided on
16th August 1932.

Legal Practitioners Act (1879), S. 14—Suspended pleader again convicted—No appearance to notice under S. 14—Removal from rolls is justified.

A pleader who was suspended for six months after a conviction for breach of Salt Act, did not apply for restoration of certificate but was again convicted under S. 17, Criminal Law Amendment Act. He made no appearance to notice under S. 14.

Held: that his name should be removed from rolls. [P 301 C 1]

Govt. Advocate—for the Crown.

Judgment.—This is a reference relating to one D, a pleader of Balasore. He was formerly suspended on 1st December 1930 by this Court for a period of six months after his conviction under S. 9, Salt Act. He did not make any application for the restoration of his certificate and on 21st January 1932 he committed the offence of taking out a procession without a license and proceedings were taken against him under S. 17 (1), Criminal Law Amendment Act, and he was sentenced to another period of six months imprisonment. The District Judge thereupon, on 1st February 1932, issued notice to him under S. 14, Legal Practitioners Act, to show cause why proceedings should not be taken against him and he made no appearance to that notice. In these circumstances, as the former punishment of suspension appears to have been fruitless, the recommend-

ation by the District Judge is justified and he will be removed from the rolls.

M.N./R.K.

Order accordingly.

* * A. I. R. 1932 Patna 301

Full Bench

COURTNEY-TERRELL, C. J., FAZL ALI
AND AGARWALA, JJ.

Ram Chander Pandey—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 199 of 1932, Decided on 19th August 1932, against order of Sess. Judge, Shahabad, D/- 22nd February 1932.

**** Criminal P. C. (1898), Ss. 386 and 250—Compensation under S. 250 is realizable under S. 386—Hindu complainant dying while joint before property attached—Property passes by survivorship and cannot be attached—Hindu Law, Succession.**

Under S. 547 money ordered to be paid as compensation under S. 250 is recoverable as if it were a fine ; and the methods of recovering a fine are provided by S. 386. S. 386 does not authorize the attachment of properties belonging to a person other than the offender. Therefore property which belonged to the complainant, who died before the property was attached, and other members of the joint Hindu family of which he was a member, is not liable to attachment. [P 301 C 2 ; P 302 C 1]

Parsuram Prasad Varma—for Petitioner.

Agarwala, J.—The facts giving rise to this application may shortly be stated as follows: One Ramnaresh Pandey laid a first information against certain persons at the Arrah mofussil police station. The investigating Sub-Inspector reported the information to be false. Ramnaresh then filed in the Court of a Magistrate a petition which was in substance a complaint that the persons named by him in the first information had committed theft. The persons so accused were put on their trial and acquitted, the trial Court holding that the complaint against them was both false and vexatious. Accordingly the Magistrate called upon the complainant to show cause why he should not pay Rs. 25 as compensation to each of the persons whom he had falsely accused. The cause shown was not considered satisfactory and the complainant was ordered to pay the compensation mentioned above : in default of payment he was ordered to undergo simple imprisonment for a month.

Against that order the complainant appealed to the Sessions Judge of Shahabad

but died before the appeal was heard. The appeal however was prosecuted by his son Ramchander Pandey, who, together with his own sons and his cousin and the latter's sons, constituted a joint Hindu family of which Ramnaresh was also a member up to the time of his death. The Sessions Judge dismissed the appeal and the Magistrate who had tried the case then called upon Ramchander Pandey to pay the compensation for which his father had originally been made liable. Ramchander objected that he was not liable to pay the compensation. This objection was overruled. He then moved the Sessions Judge to refer the matter to this Court. This prayer was refused. Ramchander then applied to this Court in revision and a rule was issued to the District Magistrate to show cause why the order complained against should not be set aside. At the hearing of this rule no one has appeared in support of the order of the lower Court. By reason of the provisions of S. 547, Criminal P. C., money ordered to be paid as compensation under S. 250 is recoverable as if it were a fine ; and the methods of recovering a fine are provided by S. 386. Under that section action for the recovery of a fine may be taken in either or both of the following ways, that is to say : (a) by issue of a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender ; and (b) by issue of a warrant to the Collector of the District authorizing him to realize the amount by execution, according to civil process, against the moveable and immovable properties, or both, of the defaulter.

In the present case the Magistrate elected to adopt the first of these two methods, i. e., he issued a warrant for the levy of the compensation by attachment and sale of the moveable property belonging to the offender. Now the petitioner, in his affidavit, has sworn that his father had no assets except his undivided share in the properties of the joint family of which he was a member. On the death of Ramnaresh the surviving members of the family succeeded by survivorship to the whole of such properties and therefore there is no moveable property "belonging to the offender" Ramnaresh which can be attached. S. 386 does not authorize the attachment of properties belonging to a person other than the offender.

It follows therefore that property which belongs to the petitioner and the other members of the joint family of which he is a member, is not liable to attachment. I would therefore set aside the order calling upon the petitioner to pay the compensation which his father was ordered originally to pay. The money paid as compensation will be refunded.

Courtney-Terrell, C. J.—I agree.

Fazl Ali, J.—I agree.

M.N./R.K. *Application allowed.*

* A. I. R. 1932 Patna 302

COURTNEY-TERRELL, C. J. AND

DHAVLE, J.

Emperor

v.

Rashbehari Lal and others—Accused.

Death Ref.No. 17 of 1932, and Criminal Appeals Nos. 151 and 160 of 1932, Decided on 28th June 1932, made by Sess. Judge, Patna, D/- 31st May 1932.

(a) Criminal P. C. (1898), Ss. 374, and 418—Person convicted in trial by jury along with others, sentenced to death, can appeal on matter of fact and law.

Section 418 restricts appeals in jury cases as a general rule to matters of law. This restriction however does not apply to references under S. 374, Criminal P. C., and sub-S. (2), which was added to S. 418 in 1923, provides that where in a case tried by a jury any person is sentenced to death any other person convicted in the same trial may appeal on a matter of fact as well as a matter of law: 2 C. W. N. 49, *Ref.*

[P 302 C 2 ; P 303 C 1]

(b) Criminal P. C. (1898), Ss. 226 and 227—Conviction on charge not expressly formulated is not improper if facts are same and additional evidence is unnecessary.

A conviction upon a charge which was not expressly formulated is not improper where the facts which it was necessary to prove on the charge as framed and on which evidence was given are the same as the facts upon which the accused could be convicted of the substantive offence provided that the accused is put to no disadvantage and would have had to adduce no further evidence: A. I. R. 1929 Pat. 11, *Foll.*

[P 303 C 1]

Where the charge framed against the accused is one of constructive murder only—Ss. 302, 149—and the jury finds the accused guilty of murder substantively and not merely constructively under S. 149 and the Judge accepts the verdict as proper on the view that the men concerned were all liable to be convicted under S. 302 by virtue of the provisions of S. 149, I. P. C., the conviction of the accused under S. 302 is not bad in law and can stand. [P 303 C 1]

(c) Criminal P. C. (1898), S. 278 (g)—Objection should be raised before hearing of appeal.

The allegation that one of the jurors did not know or understand English should be supported

by means of an affidavit before the hearing of the appeal so that the Crown Counsel could make the necessary inquiry and file a counter-affidavit if necessary. [P 303 C 2]

Md. Yunus and Kapildeo Narain Lal—for Appellants.

Shiveshwar Dayal, Govt. Pleader—for the Crown.

Dhavle, J.—Rashbehari Lal and 21 other persons were tried by jury in the Sessions Court of Patna for a riot in which one Sitasaran Singh, a zamindar and cultivator of Sinawan in the thana of Ekangarsari, was murdered. Six of them were charged under S. 148, and the rest under S. 147, I. P. C., and they were all further charged under S. 302 read with S. 149, I. P. C. By a majority of six to one the jury brought in a verdict of guilty under Ss. 302 and 148, against eight of the accused. The Sessions Judge accepted the verdict under S. 302 and sentenced seven of them Rashbehari Lal, Dhunukdhari Lal, Jugul Singh, Jaldhar Singh, Sita Raut, Badri Singh and Chandar Singh, to death. and the eighth man, Saheb Singh, to transportation for life. Three of these eight men had been charged under S. 147 and not under S. 148, but the learned Judge did not consider it necessary to refer this part of the verdict to the High Court and passed no sentence under S. 148 on any of the eight men found guilty under this section by the jury. By a majority of six to one the jury also found the other 14 accused guilty under S. 147 and not guilty under S. 302/149, I. P. C. The Sessions Judge accepted this verdict and sentenced four men Mangru Mahto, Sakhu Pasi, Bajrangi Singh and Bhim Singh to five year's rigorous imprisonment and a fine of Rs. 50 each, and the other ten men to two years' rigorous imprisonment and a fine of Rs. 100 each.

The sentences of death passed on seven of the accused have been referred to this Court for confirmation under S. 374, Criminal P. C., and all the 22 accused have also appealed against their convictions and sentences. S. 418, Criminal P. C., restricts appeals in jury cases as a general rule to matters of law. This restriction however does not apply to references under S. 374, Criminal P. C.: see *Queen-Empress v. Chatradhari Goala* (1); and sub-S. 2 which was added to S. 418 in 1923, provides that where in

(1) [1897] 2 C. W. N. 49.

a case tried by a jury any person is sentenced to death, any other person convicted in the same trial may appeal on a matter of fact as well as a matter of law. (After stating the facts of the case in detail and discussing the evidence, his Lordship proceeded.) The jury found these men guilty of murder substantively, and not merely constructively under S. 149, I. P. C. The charge framed was however a charge of constructive murder only—S. 302 read with S. 149, I. P. C. Learned counsel has urged that the jury obviously failed to understand the directions of law correctly given to them by the learned Judge, and that they were not entitled on the charge as framed to find these men guilty under S. 302. The learned Sessions Judge apparently accepted the verdict as proper on the view that the men concerned were all liable to be convicted under S. 302 by virtue of the provisions of S. 149, I. P. C. In any case it was ruled in *Bhondu Das v. Emperor* (2) that a conviction upon a charge which was not expressly formulated is not improper where the facts which it was necessary to prove on the charge as framed and on which evidence was given are the same as the facts upon which the accused could be convicted of the substantive offence, provided that the accused is put to no disadvantage and would have had to adduce no further evidence. In the present case the prosecution story even in the commitment proceedings was that these eight accused had taken the parts now assigned to them. A substantive charge of murder could thus have been framed against them and the constructive charge framed under S. 302/149, I. P. C., actually required them to prove more than if they had been directly charged with the murder. In my view therefore the convictions of these eight men under S. 302, I. P. C., must be affirmed. Having regard to the deliberate character of the assassination I would accept the reference and confirm the death sentences passed on seven of them. I would also affirm the sentence of transportation for life on the eighth man Saheb Singh.

As regards the other 14 appellants, the jury were satisfied that they took part in the rioting, but they were not satisfied that they were liable for the

murder. The learned Sessions Judge had pointed it out to the jury that the common object of the unlawful assembly as charged was twofold: (1) assaulting Sitasaran Singh, and (2) intentionally causing his death. The jury obviously found the former, but not the latter. The learned Judge also pointed out that four of the accused Mangru, Sukhu, Bajrang and Bhim had been recognized by Raghuni but not by Ramlagan. It was open to the jury to act on the evidence of Raghuni alone, but there is a well-known danger in cases of this kind which must not be ignored: in a time of excitement and confusion, there is a possibility of honest witnesses being mistaken as regards the persons they think they have seen. In addition to this, it appears in the present case that Raghuni did not mention Mangru, Sukhu Bajrangi and Bhim to the police at an early stage. As the appellants are entitled to raise matters of fact, it is open to this Court to hold and act upon the view that the participation of these four men in the riot has not been fully established. The learned Sessions Judge was of course bound by the finding of fact arrived by the jury, but it was probably on account of the difference in the evidence against these men and the other ten that he awarded to these four appellants a smaller sentence than the others convicted under the same section. I would accordingly allow the appeal of these four men and acquit them, and I would dismiss the appeal of the other ten appellants convicted under S. 147, I. P. C.

It remains to notice one other point: it was stated in the petition of appeal that out of the seven jurors who tried the case one did not know English at all and another could not follow the arguments of the lawyers of the charge of the Judge if made or delivered in English. This on the face of it is a matter which should have been mentioned to the learned Judge below when he was empanelling the jury. It was said on behalf of the appellants that they were not aware at that time of these matters. If so, the allegations should have been supported by an affidavit filed in time so that the Crown could make the necessary inquiries and file a counter-affidavit if necessary before the appeal came on for hearing. The appellants deliberately refrained from

2, A. I. R. 1929 Pat. 11=113 I. C. 676=30
Cr. L. J. 205=7 Pat. 758.

doing so, but filed an affidavit made by one Dwarka Singh on the day the appeal came on for hearing. Dwarka Singh was cross-examined by the Government Pleader, who was thus able to establish that the affidavit was valueless in spite of the man's oath that the facts stated in the affidavit were true to his knowledge. Dwarka Singh had to admit that he himself did not know English so that it was idle for him to swear that one of the jurors did not know English sufficiently. He also admitted that as regards total ignorance of English on the part of another juror, all that had happened was that while going somewhere, he had heard two men talking to each other and one of them told him that the juror did not know English. Dwarka Singh says that he mentioned the fact to the pleader who filed the appeal, and that the pleader so far from suggesting that the appeal should be accompanied by an affidavit, told him that the matter would be seen to hereafter. It is clear that the allegation of fact in the petition of appeal was made in circumstances which do not show that the pleader at all realized his responsibility. This Court has even had before it more than one instance in which a false affidavit was sworn, it was said on the advice of a pleader. Mr. Yunus said that he had been briefed in the case only a day or two before the hearing of the appeal. After the miserable failure of Dwarka Singh's affidavit, Mr. Yunus attempted at a much later stage to file another affidavit, but it was impossible even to entertain it. It is *prima facie* incredible that the Public Prosecutor and an experienced Sessions Judge would address a jury in English without ascertaining that all the jurors knew that language; and we were informed by a pleader, who appeared with the Public Prosecutor in the Court of session, that before opening the case the Public Prosecutor had inquired from the jurors in what language they would like to be addressed. There was, I regret to say, another pleader appearing on the other side who contradicted this; but further inquiry became unnecessary because of what the Government Pleader brought out in the cross-examination of Dwarka Singh.

Courtney-Terrell, C. J.—I agree.

K.N./R.K.

Order accordingly.

A. I. R. 1932 Patna 304

KULWANT SAHAY AND SCROOPE, JJ.
Rambeas Tewari and others—Defendants—Appellants.

v.

Akhauri Raj Mohan Sahay and others—Plaintiffs—Respondents.

Second Appaal No. 775 of 1929, Decided on 6th August 1931.

(a) **Bengal Tenancy Act (1885), S. 148-A**—Suit for arrears of rent—One of the plots in the holding omitted—Suit is not rent suit but money suit and decree passed therein is money decree.

Where a suit is instituted for arrears of rent in respect of a part of a holding and not in respect of the whole holding, the consequence of such a suit would be to treat it not as a rent suit but as an ordinary money suit and that the decree that may be passed in a suit of this nature will only be treated as a money decree and not as a rent decree. The effect of not including in the suit one of the plots comprised in the holding would not be to make the suit not maintainable at all. [P 305 C 1]

(b) **Limitation Act (1908), S. 22 (2)**—Defendant transferred to category of plaintiff—Bar of limitation is saved.

There is no authority for contention that sub-S. (2), S. 22, does not refer to cases where by the transfer of a defendant to the category of plaintiff the claim is enhanced. Sub-S. (2) was especially added with the object of saving the bar of limitation when a defendant is transferred to the category of plaintiff. [P 305 C 1]

P. Dayal, Rajeshwari Prasad, B. P. Varma, J. K. Prasad and Ramnandan Prasad—for Appellants.

Shiveshwar Dayal and D. N. Varma—for Respondents.

Kulwant Sahay, J.—This is an appeal by the tenants defendants and it arises out of a suit for recovery of bhaoli rent. It appears that the suit was originally brought by plaintiff 1, Akhauri Raj Mohan Sahay alone. He was interested in eight annas share of the rent claimed and the other eight annas belonged to plaintiffs 2, 3 and 4 who were originally defendants 6, 7 and 8 in the suit. They were described as the pro forma defendants and it was stated in the body of the plaint that the collection of rent of the plaintiffs and the pro forma defendants was joint, but that on account of certain ill-feelings which had recently arisen between them the pro forma defendants refused to join the plaintiff in bringing the suit and that the plaintiff was not aware as to whether the pro forma defendants had realized their share of the rent or not. Plaintiff 1 therefore asked for his own eight annas share of the rent, but he added

that if the pro forma defendants had not realized their rent, then it would be open to them to become plaintiffs on payment of the court-fee. In para 8 of the plaint it was stated that if on account of nonpayment of court-fee on 16 annas rent, the Court feels difficulty in proceeding with the suit, then it may take the full court-fee and pass a decree for entire 16 annas rent against the defendants. The schedule attached to the plaint gave the particulars required by S. 148, Ben. Ten. Act. In that schedule a number of plots were entered as the plots forming the holding of the tenants defendants. In the written statement filed by the tenants defendants it was contended that one of the plots, namely, survey plot No. 910 which formed a part of the holding had been omitted and that therefore the suit could not proceed. There were other allegations as regards payment and limitation with which we are not concerned here. On 22nd November 1928 the pro forma defendants 6, 7 and 8, namely, the owners of the other eight annas share in the property applied for their being transferred from the category of defendants to that of plaintiffs and the learned Munsif by his order of that date made an order transferring them to the category of plaintiffs. Upon this being done these newly transferred plaintiffs filed an account of the sum due to them and paid the court fee. The question then raised was that so far as they were concerned a part of the claim was barred. Both the Courts below have decreed the claim of the plaintiffs.

In this appeal the first question raised is that having regard to the fact that one of the plots comprised in the holding was left out of the schedule attached to the plaint, therefore the suit was not maintainable at all. It appears that as regards plot No. 910 there was a dispute between the parties and the plaintiff had instituted a suit claiming possession of plot No. 910 on the ground that it was a part of his zirat land. An appeal in that suit was pending in the High Court at the time the present suit was instituted. Plot No. 910 was therefore not included in the schedule attached to the plaint. The result therefore is that the suit was instituted in respect of a part of the holding and not in respect of the whole holding. The consequence of such

a suit would be to treat it not as a rent suit but as an ordinary money suit and that the decree that may be passed in a suit of this nature will only be treated as a money decree and not as a rent decree. The effect of not including plot No. 910 would not be to make the suit not maintainable at all.

The second point raised in this appeal is that the suit was barred as regards the share of the pro forma defendants who had been transferred to the category of plaintiffs in respect of two of the years in suit, namely, the years 1931 and 1933 Fasli. Now this point is met by the provisions of S. 22, sub-S. (2), Lim. Act. This section especially provides that where a plaintiff is made a defendant or a defendant is made a plaintiff, the bar of limitation will not arise. It is however, contended that sub-S. (2), S. 22, Lim. Act, does not refer to cases where by the transfer of a defendant to the category of plaintiff the claim is enhanced. In my opinion there is no authority for this contention. In order to put that interpretation upon sub-S. (2), S. 22, it will be necessary to read into the subsection words which do not occur there. Sub-S. (2) was especially added with the object of saving the bar of limitation when a defendant is transferred to the category of plaintiff. Sub-S. (2) was introduced into the Act by the amending Act 9 of 1908 and even before that amendment it had been held that the effect of transferring a defendant to the category of plaintiff was not the same as adding a new plaintiff within the meaning of sub-S. (1), S. 22. I am therefore of opinion that the plea of limitation has no substance.

The third point taken was the plea of payment. It appears that this question was raised in the trial Court but it was not raised in the Court of appeal below. The learned District Judge on appeal sets out the points urged before him and the question as regards payment is not one of the points urged before him. Moreover, the question as regards payment is a question of fact and it does not involve any question of law.

The last point raised is that the Courts below having discarded the appraisement papers of the plaintiffs ought not to have relied upon those papers for the purpose of finding the kind of crops produced on the land. The learned District Judge

himself explains what he meant by saying that the appraisement papers could not be relied upon. He says that those papers cannot be relied upon for the purpose of finding the quantity of crops but as regards the kind of crops he relies upon those papers. There is nothing wrong in his relying upon those papers for the purpose of finding the kinds of crops on the land and in not relying on them for any other purpose.

There is therefore no substance in this appeal and it must be dismissed with costs.

Scroope, J.—I agree.

K.N./R.K.

Appeal dismissed.

*** A. I. R. 1932 Patna 306**

MACPHERSON AND FAZL ALI, JJ.

Brajasunder Das—Appellant.

v.

Radha Prasad Bhagat—Respondent.

Appeal No. 3 of 1931, Decided on 28th January 1932, against original order of Sub-Judge, Cuttack, D/- 17th November 1930.

*** (a) Limitation Act (1908), Art. 182—Application for execution against wrong person as legal representative under bona fide belief is step-in-aid of execution.**

An application for execution of a decree made against a wrong person under the bona fide belief that that person was the real legal representative of the judgment-debtor is an application in accordance with law within the meaning of Art. 182 and in any event it is clearly an application to take a step-in-aid of execution of the decree and does give a fresh start to the period of limitation: *A. I. R. 1927 Pat. 92*; *35 Cal. 1047* and *A. I. R. 1924 Pat. 333, Foll.*

[P 307 C 1]

(b) Civil P. C. (1908), O. 21, R. 17—Court can allow amendment of application for execution before proceedings end.

A Court is competent at any time before execution proceedings terminate, and before the decree becomes barred by limitation, to allow a decree-holder whose application for execution of his decree is pending to amend the application by the addition of other properties to the list of properties sought to be attached: *A. I. R. 1923 Pat. 224, Foll.*; *17 Cal. 631 (F.B.), Dist.*

[P 307 C 2]

S. P. Das Gupta—for Appellant.

S. C. Bhose—for Respondent.

Fazl Ali, J.—This appeal arises out of an execution proceeding which the appellant sought to resist in the Court of the Subordinate Judge of Cuttack, on two principal grounds: (1) that the decree was barred by limitation and (2) that the application for execution was not in accordance with law. It appears that the decree was passed on 25th November 1927.

The first execution petition was filed on 10th May 1929, and the present execution proceedings were started on 3rd April 1930. It was contended by the appellant that the execution petition of 10th May 1929 was neither in accordance with law nor could it be regarded as a step-in-aid of execution inasmuch as out of the two executors to the estate of the judgment-debtor only one, namely, Brajasunder Das, had been made a party to that application and the other executor, namely, Lalmohan Patnaik had not been made a party. In reply to this contention it was pointed out on behalf of the decree-holder that shortly before the execution proceedings of the year 1929 were started, the appellant had executed a sale deed on 11th February 1929 in which he had stated in clear terms that Lalmohan Patnaik had filed a petition of resignation in the High Court and the High Court had removed his name from the category of executors on 12th January 1929. Reliance was placed on behalf of the decree-holder also on Ex. A, a petition filed by the appellant on 16th February 1929, which runs as follows:

“After the institution of the said execution case the petitioner's co-executor Babu Lalmohan Patnaik tendered his resignation to his post of executor and the High Court has accepted the same. The petitioner is qualified under law to conduct the said execution case alone. As the said Lalmohan Patnaik tendered resignation, it is necessary that the petitioner should take permission to conduct the said execution case singly. Therefore the petitioner begs to file this petition for permission and prays that permission for conducting the said execution case singly be granted to him.”

Evidently this prayer was allowed and the property which was sought to be proceeded against by the decree-holder in the execution proceedings of the year 1929 was purchased in the name of the appellant only. Before the learned Subordinate Judge two witnesses were examined on behalf of the appellant, one of whom admitted that Lalmohan Patnaik had applied before the High Court renouncing his executorship and that for the last four or six years Brajasunder Babu had been defraying the expenses of the estate and that the accounts were with him. It was however also stated that Lalmohan Babu had not yet been discharged from the executorship. It is noticeable that the order sheet of the High Court has not been filed on behalf of the appellant and the question has to be deci-

ded as to whether the oral evidence adduced on behalf of the appellant is sufficient to displace the admission made by him in Exs. A and B wherein it was stated in clear terms that the High Court had removed the name of Lalmohan Patnaik from the executorship. The appellant himself did not come to the witness box to explain his admission and it would seem difficult in these circumstances to hold that his admission can be entirely ignored in these proceedings. Assuming however that the statement made by his witness 1 is correct, it would appear to me that the application of the decree-holder of 10th May 1929 was in any case a step-in-aid of execution within the terms of Art. 182, Lim. Act. It has been held in *Ghaneshwar Singh v. Than Mal* (1) that an application for execution of a decree made against a wrong person under the bona fide belief that that person was the real legal representative of the judgment-debtor is an application in accordance with law within the meaning of Art. 182, Sch. 1, Lim. Act, and that in any event it was clearly an application to take a step-in-aid of execution of the decree and would give a fresh start to the period of limitation.

The same view appears to have been taken in *Bipin Behari Mitter v. Bibi Zohra* (2) and in *Puran Mal v. Mt. Dilwa* (3). In this particular case there cannot be any question about the bona fides of the decree-holder in view of the statements made by the appellant himself in Exs. A and B and the fact that the property which was proceeded against by him in the year 1929 had been purchased by the appellant himself on the representation that Lalmohan Babu was no longer an executor. It is also urged by the decree-holder that the application of 10th May 1929 was in accordance with law and in accordance with the requirements of O. 21, R. 11, inasmuch as all the details required by that provision are to be found in that application. In my opinion the application of 10th May 1929 was in any event a step-in-aid of execution. If that view is permissible it is clear that the present application was within time and the decree was not barred by limitation on 3rd April 1930 when this application was presented. The next

objection of the decree-holder is that no amendment should have been allowed by the learned Subordinate Judge after the execution petition had been registered. It appears that the learned Subordinate Judge allowed the decree-holder to amend the petition by introducing the name of Lalmohan Patnaik on the ground that there was in any case a mere technical defect in the application. The learned Advocate for the appellant relies in this connexion on *Asgar Ali v. Troilokya Nath Ghose* (4). That case was distinguished by a Division Bench of this Court in *Ram Sumran Prasad v. Ram Bahadur* (5). In the latter case it was held that a Court is competent at any time before execution proceedings terminate, and before the decree becomes barred by limitation, to allow a decree-holder whose application for execution of his decree is pending, to amend the application by the addition of other properties to the list of properties sought to be attached.

In the judgment which was delivered by Mullick, J., a reference was made to the argument advanced in that case that R. 17, O. 21, contemplates that there can be no amendment after the execution case had been registered. The learned Judge however pointed out that there could be no force in that contention and it has been so held in *Gnanendra Kumar Roy v. Shyama Sundar* (6). Towards the end of his judgment he further pointed out that on the day the amendment was allowed to be made the Court had jurisdiction to accept the amended petition as a fresh application for execution or could entertain the application for amendment of the previous application. In my opinion, even if it was to be held that no amendment is permissible after the application has been registered, there was nothing to prevent the Court from treating the amended application as a fresh application for execution as, on the date the amendment was allowed to be made, the decree was not barred by limitation. As both the points urged in this appeal fail, I would dismiss it with costs.

Macpherson, J.—I agree.

K.N./R.K.

Appeal dismissed.

(4) [1890] 17 Cal. 631 (F.B.).

(5) A. I. R. 1923 Pat. 224=71 I. C. 741=2 Pat. 328.

(6) [1918] 44 I. C. 553.

(1) A. I. R. 1927 Pat. 92=93 I. C. 501.

(2) [1908] 35 Cal. 1047.

(3) A. I. R. 1924 Pat. 333=72 I. C. 1003.

* **A. I. R. 1932 Patna 308**

KULWANT SAHAY, J.

Mt. Chamela Kuar—Plaintiff—Petitioner.

v.

Pursottam Das and others—Defendants—Opposite Parties.

Civil Revn. No. 289 of 1932, Decided on 25th July 1932, against the order of Sub-Judge, First Court, Patna, D/- 30th May 1932.

* **Civil P. C. (1908), O. 33, R. 5—Omission of goods of small value from list of property—Omission not mala fide or material for decision of pauperism—Application cannot be rejected.**

The object of prescribing that the pauper should set out a list of his properties is to help the Government in ascertaining whether the applicant is in a position to pay the court-fee payable on the plaint. It cannot be said that the omission of a few articles worth a few rupees which could in no way affect the decision of the Court on the question of pauperism has the effect of throwing out the application on the ground that it does not contain a list of all the properties held by the petitioner. Where there is nothing to show that the omission of moveables of small value was an act of bad faith on the part of the petitioner, the application cannot be rejected on that ground : *A. I. R. 1930 Pat. 368, Expl.* [P 303 C 1]

Murari Prasad and S. M. Gupta—for Petitioner.*Janak Kishore and C. P. Sinha*—for Opposite Parties.

Judgment.—This is a very unfortunate case. The petitioner is the wife of defendant 1 both of whom are fairly advanced in age. The case of the petitioner is that she was turned out from the house of her husband and she left the house with a pair of saris only. She brought the suit for maintenance claiming Rs. 150 a month with arrears for two months and for recovery of possession of her ornaments and jewellery and she further wants a house for her residence. She stated that she had no property in her possession and that whatever property she had she left in the house of her husband when she left the house. She therefore made an application for leave to sue as a pauper, and in her application she gave a schedule of the properties which according to her were valued at Rs. 72-8-0. The court-fee payable upon her plaint is more than Rs. 1,200. Her authorized agent was examined by the Court under O. 33, R. 4. The Court thereafter issued notice under O. 33, R. 6 which evidently shows that it was satisfied that there was no ground for reject-

ing the application under R. 5. The Government Pleader after enquiry reported that the petitioner was a pauper. Defendant 1 however filed an objection at a late stage stating that the petitioner had ornaments and jewellery worth about Rs. 5,000 and had got other articles which were sufficient to pay the court-fee. The petitioner was then examined in Court. She denied her having ornaments and jewellery worth Rs. 5,000.

In her plaint she had claimed ornaments worth Rs. 3,000 as having been taken away by the husband; but in the course of her cross-examination she stated that she had got four or five petis (boxes) whereas in her schedule she had shown that she had only two trunks. Again in her evidence she mentioned that she had four or five chaukis whereas in her schedule she had stated that she had only two chaukis. In her evidence she further stated that she had two almirahs whereas in the schedule only one almirah was mentioned. The learned Subordinate Judge notices the discrepancies in respect of these three items, namely, the trunks, the chaukis and the almirahs. He then refers to the observations of this Court in the case of *Durga Prasad v. Sri Niwas Surekha* (1) and he thinks that according to the view expressed by this Court in that case he was bound to reject the application on the ground that the petitioner had not set forth her assets with the utmost good faith in her application for leave to sue as a pauper. He has not considered the case on merits and he does not find that the petitioner is not a pauper and that she is in a position to pay the court-fee.

Now, the case relied upon by the learned Subordinate Judge was a wholly different case. There certain immovable properties were left out and the equity of redemption which the petitioner had in that case and which was said to be very valuable was also omitted, and this Court was evidently of opinion in the application which they were considering, namely, an application for leave to appeal as a pauper in this Court, that there had not been a bona fide disclosure of all the assets which the alleged pauper had. Their Lordships refer to the fact that the petitioner in that case had interest in certain immovable properties which he had failed to set forth in his

(1) *A. I. R. 1930 Pat. 368=123 I. C. 398.*

application to this Court and their Lordships observed that it is most important that all applications for leave to sue or prefer appeals in forma pauperis should set forth with the utmost good faith, as in the disclosure of assets in insolvency proceedings, the whole of the assets of the applicant. Their Lordships further observed that it must be understood in future that if it should be revealed in the course of the hearing of the application that the applicant has not stated with utmost good faith the whole of his assets, the application will be rejected at the very earliest stage.

The learned Subordinate Judge has wholly misapprehended the observations of this Court referred to by me. It was never the intention of this Court to lay it down that if one or two wooden chaukis or if a wooden box or a wooden almirah worth a few rupees be left out such an omission will have the effect of rejecting the application without determination on merits. It must be found that there was a male fide omission from the schedule of properties which would materially affect the question of pauperism. As I understand it the object of prescribing that the pauper should set out a list of his properties is to help the Government in ascertaining whether the applicant is in a position to pay the court-fee payable on the plaint. It cannot be said that the omission of a few articles worth a few rupees which could in no way affect the decision of the Court on the question of pauperism has the effect of throwing out the application on the ground that it does not contain a list of all the properties held by the petitioner. I am of opinion that there is nothing to show that the omission in the present case of the two trunks or the chaukis and the almirah was an act of bad faith on the part of the petitioner. It is rather difficult to say how the petitioner would have been benefited by a deliberate omission of these articles. She had left the house and was living in another place and she had given a list of the articles which she believed belonged to her, although most of these articles appear to belong to her husband, as in a Hindu family it is difficult to say that a bed upon which the Hindu wife sleeps is her own exclusive property and not the property of the husband.

However having regard to the circum-

stances of the present case, I am of opinion that the learned Subordinate Judge was wrong in rejecting it on the ground that the application did not comply with the law for the reasons stated by him. He must decide the case on merits and find whether or not the petitioner is a pauper and whether leave should be given to her to sue as a pauper. The order is therefore set aside and the case remanded to him for disposal according to the observations made above. The petitioner is entitled to her costs in this Court hearing fee three gold mohurs.

M.N./R.K.

Petition allowed.

* A. I. R. 1932 Patna 309

MOHAMMAD NOOR AND DHAVLE, JJ.

Sital Prasad Shukul and another—Appellants.

v.

Babu Lal Shukul and another—Respondents.

Appeal No. 93 of 1931, Decided on 29th July 1932, against order of Sub-Judge, Saran, D/- 13th January 1931.

(a) **Limitation Act (1908), Art. 182—Application by decree-holder, asking Court to do what it is not empowered to do, is not step-in-aid.**

When a decree-holder asks a Court to do a thing which the Court is not empowered to do, such an application cannot be held to be a step-in-aid of execution: *A.I.R. 1922 Pat. 188, Foll.* [P 310 C 2]

* (b) **Civil P. C. (1908), S. 39—Application for transfer of decree to Court not having jurisdiction is not step-in-aid of execution—Limitation Act (1908), Art. 182—Civil P. C., O. 21, R. 11.**

An application by the decree-holder to the Court which passed the decree for transfer of that decree to a Court having no jurisdiction to execute it is not a step-in-aid of execution. The mere fact that such an application is in a form prescribed for execution applications under O. 21, R. 11, will make no difference. An application for transfer of a decree for execution cannot become an application for execution simply because the form of the latter has been adopted: *A. I. R. 1916 P.C. 16 and A. I. R. 1924 Pat. 471, Dist.* [P 311 C 2]

R. S. Chatterji, Jadubans Sahay and Bankey Behari Sahay—for Appellants.

Hareshwar Prasad Sinha and B. N. Rai—for Respondents.

Judgment.—This appeal arises out of an execution case. The simple issue involved is whether the execution of the decree in question is barred by limitation. The plaintiff instituted a partition suit valuing it at Rs. 76,887-1-8. The suit went up to the High Court and the final decree was passed on 31st January 1923.

The execution relates to the costs of the suit awarded by the High Court amounting to Rs. 649-11-0. Several applications for execution were filed and dismissed. The last one about which no objection can be raised was the fourth one taken out on 27th August 1924, and disposed of on 17th September 1924. After that on 26th July 1927, the appellants asked the Subordinate Judge of Chupra, who had decided the case, to send the decree for execution to the Munsif of Siwan. It is obvious that so far as this province is concerned the Munsif of Siwan had no jurisdiction to execute the decree, as it was passed in a suit beyond the limits of his pecuniary jurisdiction. Be that as it may, the learned Subordinate Judge did as a matter of fact transfer the decree for execution to the Munsif of Siwan. The decree holders appellants took out two executions in that Court. The second one of them was disposed of on 25th July 1929. In that execution the judgment-debtors took an objection about the jurisdiction of the Munsif of Siwan to execute the decree. The learned Munsif decided against them, but on appeal the objection was upheld, and it was decided that the Court of the Munsif of Siwan had no jurisdiction to execute that decree. Afterwards the present execution was started on 25th March 1930, and this execution is the subject matter of the present appeal.

The learned Subordinate Judge has held that the execution was barred, holding that the application of 26th July 1927, asking the Subordinate Judge of Chupra to transfer the decree for execution to the Munsif at Siwan was not a step-in-aid of execution. He has relied upon a decision of this Court in *Amrit Lal v. Murlidhar* (1). He has also discussed the question whether the decree-holders were entitled to avail themselves of the provisions of S. 14, Lim. Act, and to deduct the period during which they were engaged in executing their decree in the Court of the Munsif of Siwan and has held that there was no good faith on the part of the decree holders and therefore S. 14, Lim. Act, had no application. It is not necessary for us to decide about the applicability of S. 14, Lim. Act. It is clear on the facts before us that S. 14 even if applicable will be of no help to

the decree-holders. Assuming that they are entitled to deduct the period during which they were taking out executions before the Munsif of Siwan, even then the present application is barred by limitation. Utmost that they can claim is to deduct the period between 26th July 1927 (when they applied before the Subordinate Judge of Chupra to transfer their decree to the Munsif at Siwan) and 25th July 1929, (when their second and last application for execution before the Munsif of Siwan was disposed of). If this period is deducted from the period of five years six months and eight days which lapsed between 17th September 1924 (when their last execution before the proper Court, namely the Subordinate Judge of Chupra was disposed of) and 25th March 1930 (when their present application was filed), there will still be a delay of six months and eight days which the decree holders cannot in any circumstances be permitted to deduct. In fact when this was pointed out to the learned advocate for the appellants by the learned advocate for the respondents the former conceded that S. 14, Lim. Act, could be of no help to him in this case.

Now the simple question as contended by the learned advocate for the appellants is whether the application of 26th July 1927, asking the Subordinate Judge of Chupra to transfer the decree to the Munsif of Siwan was a step-in-aid of execution. To our mind this point is concluded by the decision of this Court referred to by the learned lower Court, namely, *Amrit Lal v. Murlidhar* (1). That case was exactly like the present one. There also a decree passed by the Subordinate Judge of Gaya was sent for execution to the Munsif of that place. This Court held that when a decree-holder asks a Court to do a thing which the Court is not empowered to do, such an application cannot be held to be a step-in-aid of execution. This being the case, the application of 26th July 1927, can in no circumstance be held to be a step-in-aid of execution. The learned advocate, however tried to distinguish that case from the present one on the ground that in the present case the application was in a form prescribed by O. 21, R. 11, and was therefore an application for execution, whereas there is nothing to show that the application in

(1) A. I. R. 1922 Pat. 188=67 I. C. 538=1 Pat. 651.

the case of *Amrit Lal* (1) was so. We do not think that the form of the application has any bearing upon this question. An application for transfer of a decree to another Court for execution need not be on any particular form.

The Code does not prescribe any such form. The form prescribed in O. 21, R. 11, is a form in which a decree-holder may apply for execution of his decree. Application for executing a decree and application for transferring a decree to another Court for execution are two different and distinct applications. Whether a particular application is an application for execution or for transfer of a decree is to be decided on the nature of the prayer made, and not on the choice of a particular form. An application for transfer of a decree for execution cannot become an application for execution simply because the form of the latter has been adopted. The fact that in the present case the application for transfer was on a form prescribed for application for execution will not make it effective when the decree holders asked the Court to do a certain thing which the Court was not empowered to do, that is, to send the decree for execution to the Court of the Munsif of Siwan which had no jurisdiction to execute that decree.

Reliance has been placed upon the case of *Maharaja of Bobbili v. Sree Rajah Narasaraju* (2). We fail to understand how that case helps the appellants. In fact it was definitely held there that an application for execution presented to a Court which had no jurisdiction to execute the decree was not a step-in-aid of execution and therefore will not save limitation. The learned advocate relied upon this case to show that a decree of the District Judge was transferred for execution to a District Munsif and that the Privy Council impliedly accepted the procedure to be correct; but there is nothing in that judgment to show the value of the suit, or whether the suit in which the decree was passed was beyond the pecuniary jurisdiction of the Munsif to which Court it was sent for execution. Another case relied upon by the learned advocate is the case of *Kishori Mal v. Jagdish Narayan* (3). The only thing

decided in that case was that some formal defect or some superfluity added to an execution application will not take away that application from the purview of sub-Cl. (5), Art. 182, Lim. Act. We have said before that in this case the application which the appellants want to bring to their help was not an application for execution at all. Few more cases have been cited by the learned advocate, but none of them is of the least assistance to him. In our opinion the learned Subordinate Judge is correct in holding that the decree under execution is barred by limitation. The appeal is dismissed with costs.

K.N./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 311

COURTNEY-TERRELL, C. J. AND
FAZL ALI, J.

Secretary of State—Appellant.

v.

Jamuna Das—Respondent.

Misc. Appeal No. 53 of 1931, Decided on 24th February 1932, against order of Dist. Judge, Patna, D/- 2nd January 1931.

(a) **Provincial Insolvency Act (1920) S. 28**—Money in third person's hand only if property of insolvent can be attached—Civil P. C. (1908), S. 60.

A sum of money in the hands of a third person can only be attached if it is the property of the insolvent and in no other circumstances. If it be shown either that the insolvent could sue that person to recover the amount or that the person held the particular sum of money in trust for the insolvent, in either of these circumstances the money could be recovered for the benefit of the creditor. [P 312 C 2]

(b) **Provincial Insolvency Act (1920), S. 28**—Gratuity which is incompleated gift and non-recoverable debt cannot be attached under Civil P. C. (1908), S. 60.

A gratuity which is a gift and not in the nature of a debt which would be legally recoverable by the ex-employee and being a gift not completed until actual payment of the sum of money cannot be attached: A. I. R. 1924 *Lih.* 688, *held obiter* and not *Foll.*; A. I. R. 1925 *Mad.* 192, *Dist.*; A. I. R. 1924 *Bom.* 88, *Ref.*

[F 313 C 1]

S. M. Mullick and N. C. Ghose — for Government.

S. N. Bose, A. Prasad, G. N. Mukherji and K. N. Lal — for Respondent.

Courtney-Terrell, C. J.—This is an appeal from an order of the District Judge of Patna in an insolvency case. The insolvent, John Herbertson, was a guard in the service of the E. I. Ry. The relationship between the guard and his employers the Railway were such that he was paid a salary and it was the

(2) A. I. R. 1916 P. C. 16=43 I. A. 238=39 *Mad.* 640=36 I. C. 682 (P.C.).

(3) A. I. R. 1924 *Pat.* 471=3 *Pat.* 42=75 I. C. 312.

custom of the Railway at the conclusion of the service of any of their servants to make a gift depending upon the quality of the service rendered by the retiring servant and his rank and the length of the service. It is expressly pointed out in the rules published by the Railway for the use of their servants that such gratuity is not payable until the end of the service and it is entirely at the discretion of the Railway and there is no contract of any kind on the part of the Railway with any of their servants that they will pay any gratuity to the servant on his retirement.

The insolvent borrowed a sum of money from a firm called Jamuna Das and brothers and then filed his application to be declared an insolvent on the ground that he was unable to pay his debts. He was about to retire from the service of the E. I. Ry. and the creditor Jamuna Das made an application to the Judge in the insolvency proceedings for leave to attach the gratuity which they anticipated would be paid to the insolvent upon his retirement. The District Judge who was at that time the incumbent of the office decided that the insolvent had not in fact relinquished service and that the amount of the gratuity which he would or might obtain from the Railway in future could not be attached because it had not been ascertained nor had it been paid over to him. The insolvent then left the country and it became known to the creditor that it was the intention of the company to pay him a sum of money which they had decided was to be his proper gratuity under their practice and he once again applied to the District Judge saying that the amount of the gratuity had now been ascertained and furthermore shewing that a letter had been written by the Railway to the insolvent in Europe asking him to nominate a bank or other agent to receive the gratuity which it was their intention to pay him and that the insolvent had replied nominating a certain bank to receive the money. He asked the District Judge in these new circumstances to attach the amount of gratuity which was at the time of the application, and is still, in the hands of the railway administration. The railway however declined to pay over the amount of the gratuity for the benefit of the creditor and the District Judge called upon them to appear and offer any observa-

tions by their legal representative which they might think fit on the situation. They did so appear and at the conclusion of the argument the learned District Judge delivered a judgment in which he directed that a letter should be written to the railway directing the payment of the gratuity into Court and also ordered that the costs of the hearing should be paid by the Railway administration to the creditor.

The law applicable to this set of circumstances is really very simple. The sum of money in the hands of the railway can only be attached if it is the property of the insolvent and in no other circumstances. If it be shewn either that the insolvent could sue the railway administration to recover the amount of the gratuity or if it can be shewn that either the railway or any other person held the particular sum of money in trust for the insolvent, in either of these circumstances the money could be recovered for the benefit of the creditor. The evidence clearly indicates that neither of these circumstances exists. In the first place there was no contract on the part of the railway with their employee that they would pay him this gratuity. An attempt has been boldly made by Mr. Bose on behalf of the creditor to urge that the past services of the insolvent to the railway coupled with the intimation to the insolvent by the railway that in consideration of those past services a particular sum would be paid to him constitute a binding contract on the part of the railway administration to pay over the specified sum to the insolvent which contract he would be able to enforce at law and that therefore the sum should properly be considered as the property of the insolvent in the hands of the railway administration. This proposition was argued with great force and skill and in support of it two cases were cited by Mr. Bose. The first is the case of *Mahammad Abdulla v. Jiwan Mal* (1), a decision of a single Judge of the Allahabad High Court.

In that case the learned Judge decided the substance of the case on other grounds but at the conclusion of his judgment he stated his opinion that inasmuch as in that case it had been decided by the donor and intimated to the donee that the gratuity would be paid to him

(1) A. I. R. 1924 Lah. 688=75 I. C. 945.

and inasmuch as the gratuity was in consideration of past services rendered to the body which gave the gratuity, it constituted a debt which could be attached under S. 60, Civil P. C. That statement was however not necessary for the decision of the case and is in the nature of obiter dictum and in any case I feel myself unable to agree with it as a proposition of law. The other is the case of *P. Kanakasabapathy Mudaliar v. Hajee Oosman Sahib* (2), and Mr. Bose relies upon the judgment of one of the Judges who was a member of the tribunal, it being conceded that the judgment of the other Judge, which was sufficient for the case, was decided upon another point altogether. The learned Judge agreed with the judgment of his colleague but offered his opinion that in a case where services were rendered by the servant in exchange for the stipulated salary but there was also the promise of the grant of a bonus it could not be held in that case that there was a promise by the employers founded upon past consideration. In any circumstances even the decision of that learned Judge in that case does not support the proposition for which it has been cited and, if it did, it was obiter dictum, and, in any case, I venture with great respect to think that it is erroneous.

The same matter has received attention in other Courts and in the case of *Natha Gulab & Co. v. W. C. Shaller & G. I. P. Ry. Co.* (3), it was laid down that a transfer intended to operate as a gift, but invalid as such, would not constitute the donor a trustee of the property for the intended donee, in other words, an imperfect gift will not be construed as a declaration of trust. In that case a Railway company had sanctioned a gratuity to one of their employees on his retirement and had sent the amount to their bankers for payment to the ex-employee and it was held that that was not equivalent to delivery even though it was coupled with a request in that case to remit the money to the office of the company in London for actual payment to the ex-employee. In short this gratuity was in my opinion, a gift and was not in the nature of a debt which would be legally recoverable by the ex-employee and being a gift it was not completed until actual

payment of the sum of money. It was urged by Mr. Bose that the intimation that the gift was to be made and the intimation of the precise sum that was to be paid was equivalent to payment just as in the case of the sale of goods where there may be constructive delivery but the analogy is misleading because in the case of constructive delivery of goods the goods must be specifically ascertained, capable of identification and separation from other goods of their kind. In this case it is clear that the mere statement that so many rupees were payable to the employee is not the setting aside of any specific currency for the benefit of the employee. It is therefore clear that the gratuity is neither a recoverable debt in the hands of a person who could be compelled to hand it over to the employee nor is it in the nature of a completed gift which once it had passed out of the hands of the donor might be attached in the proceedings.

The learned Judge who decided this case has, I think, with respect to him, fallen into an error of logic. He has put the case in this way. He said that because the employee had it left open to him to direct the railway as to the person who was to receive the money that would indicate that he had power of disposal of the gift and that therefore it was property capable of attachment and could be seized for the benefit of the creditor. The logical mistake is that the gift is not at the legal disposal of the recipient until it has become the property of the recipient, in other words, the error of logic is in the nature of *petitio principii*. In my opinion the decision of the learned Judge was erroneous and must be set aside and the contesting creditor should pay the costs throughout.

Fazl Ali, J.—I agree.

M.N./R.K.

Appeal allowed.

A. I. R. 1932 Patna 313

COURTNEY-TERRELL, C. J. AND FAZL ALI, J.

Narsingh Mahton and others—Decree-holders—Appellants.

v.

Nirpat Singh and others—Defendants—Respondents.

Appeal No. 195 of 1931, Decided on 25th February 1932, against the appellate order of Dist. Judge, Patna, D/- 6th August 1931.

(2) A. I. R. 1925 Mad. 192=87 I. C. 760.

(3) A. I. R. 1924 Bom. 88=87 I. C. 312.

Contract Act (1872), S. 135—Surety for mesne profits in case of decree—Claim compromised and time granted—Both facts discharge surety — Contract — Civil P. C. (1908), S. 145.

A term in a contract of suretyship was as follows: "If the suit is decided against the defendants and a decree for mesne profits is passed in favour of the plaintiffs, the plaintiffs would realize the amount of decree of mesne profits from the property mentioned in this deed." The suit with regard to claim of possession was decided against the defendants and the plaintiffs and the defendants compromised their dispute as to the mesne profits and agreed upon a definite sum exceeding the amount for which surety was given and a certain time was given to defendants within which to make the payment.

Held: that both by the making of the compromise and the granting of time the surety was discharged, *Rees v. Berrington*, (1795) 2 Ves. Jr. 543, *Rel. on.* [P 315 C 1]

A. B. Mukharjee and Jugal Kishore Prasad—for Appellants.

S. N. Rai—for Respondents.

Courtney-Terrell, C. J.—This is an appeal from a decision of the District Judge of Patna setting aside an order of the Subordinate Judge in proceedings in execution for the enforcement of a surety bond. The facts are very simple. The decree-holders had brought a suit against the defendants to recover possession of a piece of land and also claimed mesne profits. They obtained a decree for recovery of possession and for such mesne profits as might be found on inquiry and an inquiry was directed. They applied for the appointment of a receiver of the property in dispute and the defendants offered the surety in the case as an alternative to the appointment of a receiver. The contract of surety, the surety bond, is quite explicit in character. The surety gives the property mentioned in the surety bond as security to meet the following contingency as stated in the bond:

"If, God forbid, the suit is decided against the defendants and a decree for mesne profits is passed in favour of the plaintiffs, the plaintiffs would realize the amount of decree for mesne profits from the property mentioned in this deed."

Now in order to save the costs of an inquiry the plaintiffs and the defendants compromised their dispute as to the mesne profits and agreed upon a definite sum of Rs. 950. The original amount claimed was some Rs. 3,000. I forgot to mention that the surety bond fixes the liability of the surety at a maximum of about Rs. 500.

The plaintiffs then took steps under

the proper procedure to enforce the surety bond against the surety in the process of execution. The surety objected that by reason of the compromise he was discharged from his liability. The learned District Judge in deciding the matter seemed to think that the proper test as to whether the surety was or was not discharged was whether the surety was prejudiced by the compromise arrived at and his process of reasoning was that whereas the compromise was, as it undoubtedly was, beneficial both to the plaintiffs and the defendants it must therefore be taken as beneficial to the surety and he was not damaged by the compromise and therefore remained liable.

Now this case may be very simply decided by reference to, and construction of the contract of suretyship itself and from the words of the contract which I have quoted it is perfectly clear that the liability envisaged by the surety is that if a decree for mesne profits were passed by the Court against the defendants he would be liable for such amount as might be decreed up to Rs. 500. On the other hand, if the Court should find as a fact after inquiry, as it might well find, that notwithstanding the decree for possession and notwithstanding the decree for mesne profits, no profits were in the circumstances payable then the surety would not be liable in any sum. Now by the compromise for Rs. 950 the surety has been deprived of the possibility that he might be discharged by the decision of the Court from any liability, that is to say, if the Court found after inquiry that no mesne profits were in fact payable, and has thereby been forced to meet the liability to the full amount of his suretyship, that is to say, Rs. 500. This is clearly quite against the terms of the contract of suretyship and accordingly the surety is clearly discharged.

Various points were discussed by the learned Judge as to the proper construction of Ss. 135 to 139, Contract Act, which concern the discharge of a surety but to my mind these matters are irrelevant when one considers the contract of suretyship itself in this case. Moreover in any case it seems to me that the proper clause of the Contract Act which is applicable to this case is S. 135 and that section is quite specific in its character and lays down that if a suit is compro-

mised, that is to say, if a compromise is entered into between the principal debtor and the creditor or if time is given to the principal debtor then the surety is discharged and if that section is applied to this case the surety is most certainly discharged for not only has a compromise been entered into but time has by the compromise been given to the principal debtor. The principle applicable was laid down as long ago as 1795 in the case of *Rees v. Berrington* (1) by Lord Broughborough as follows:

"It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in any transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

In these circumstances it is, in my opinion, clear that the surety has become discharged and therefore I would set aside the order of the learned District Judge and the creditor must pay the costs of the surety throughout.

Fazl Ali, J.—I agree.

M.N / R K. *Appeal allowed.*

(1) [1795] 2 Ves. Jr. 543.

A. I. R. 1932 Patna 315

COURTNEY-TERRELL, C. J.

Puna Mahton and others--Petitioners.

v.

Emperor--Opposite Party.

Criminal Revn. No. 297 of 1932, Decided on 2nd August 1932, against order of Sess. Judge, Patna, D/- 1st July 1932.

(a) Civil P. C. (1908), O. 21, R. 37—Court issuing notice and warrant of arrest at same time acts injudicially.

Under O. 21, R. 37, the Court may choose between two alternative courses. It may (a) issue a notice upon the debtor to show cause why he should not be committed to prison, or (b) it may issue a warrant for his arrest. The Court ought not to issue both a notice to the debtor to appear and also a warrant for his arrest. Having decided to issue a notice it should not deprive the judgment-debtor of the opportunity which the notice affords him of showing cause within the time fixed by the notice by issuing a warrant for his arrest at the same time. A Court which issues a notice and warrant of arrest simultaneously acts in a highly injudicial manner. [P 316 C 1]

(b) Penal Code (1860), S. 99—Warrant of arrest—No defect in authority issuing it—Right of private defence to resist execution does not exist.

The duty of an officer who goes to carry out the orders of the Court is limited to seeing that the orders are on the face of them within the power of the Court and that they exhibit no defect in form. Apart from this it is no part of his duty to review the discretion of the Court.

Similarly it is his duty to carry out the orders given to him and not to go behind such orders. Where however there is no defect in the authority issuing a warrant of arrest and resistance is offered to persons carrying out the orders of such an authority right of private defence cannot be pleaded. [P 317 C 1, 2]

(c) Penal Code (1860), S. 99—Public servants—Protection to, how far stated.

Section 99 protects the public servant against the right of private defence even if the authority be defective in minor particulars or even if the officer exceeds his duty in a minor particular. It merely leaves the right of private defence open when the alleged authority is no authority at all and is wholly defective in form or the officer goes clearly and widely outside the duties imposed on him. If the authority has no defect the section has no operation: 21 *Mad.* 296 and 8 *All.* 293, *Ref.*

[P 317 C 1]

(d) Penal Code (1860), Ss. 99, 225-B and 353—Notice and warrant of arrest issued simultaneously—Apprehension by executing peon is lawful and resistance cannot be justified.

Where a notice and warrant for arrest of the judgment-debtor were issued simultaneously by the executing Court the apprehension of the judgment-debtor by the peon executing the warrant of arrest is a lawful apprehension however mistaken the executing Court may have been in exercising its discretion to direct that apprehension and escape from and obstruction to that apprehension are unlawful acts under S. 225-B, Penal Code, and the pushing of the peon by the accused not being justified in law amounts to an assault justifying his conviction under S. 353. [P 317 C 2]

Baldeo Sahay—for Petitioners.

S. Jafar Imam—for the Crown.

Judgment.—This is petition for the revision of an order by the Sessions Judge of Patna summarily dismissing an appeal from a First Class Magistrate convicting the petitioners in the following circumstances. A decree had been obtained in the civil Court against the petitioner Puna Mahton and the successful judgment creditor proceeded to execute it. The executing Court purporting to act under O. 21, R. 37, Civil P. C., took an unusual course. That rule is as follows:

"(1) Notwithstanding anything in these rules where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application the Court may instead of issuing a warrant for his arrest issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice the Court shall if the decree-holder so requires issue a warrant for arrest of the judgment-debtor."

Under this rule it is clear that the Court, on the application of the judgment creditor for execution may choose between two alternative courses. It may (a) issue a notice upon the debtor to show cause why he should not be committed to prison or (b) it may issue a warrant for his arrest. Moreover under para. (2) if the first course be taken and the debtor does not appear and also if the decree-holder so requires a warrant may be issued for the arrest of the debtor. In this case the Court issued to two peons both a notice to the debtor to appear and also a warrant for his arrest. It was clearly intended and the peons also so understood their instructions that the debtor should first be served with the notice and if he should intimate in any way that he had no intention of complying with it that the peons should then make use of warrant of arrest. In my opinion the Court in so acting took a wrong course. The service of a notice by a peon gives to the debtor an opportunity within the time fixed by the notice to appear before the Court. He may possibly intimate his intention not to appear but on the other hand he may within the time fixed by the notice repent of his action and decide to appear. Furthermore there is the possibility that even if he should appear the decree-holder may repent of his severity and may not ask the Court to effect the arrest of the debtor. It must be borne in mind that the Court has jurisdiction to adopt either course permitted by the rule but having decided to issue a notice it should not have deprived the judgment-debtor of the opportunity which the notice affords him. In other words the Court exercised its discretion to issue the warrant of arrest in an entirely unjudicial manner.

Nevertheless it is not contended in this case that the Court had no jurisdiction to issue a warrant of arrest and it is not contended that the warrant of arrest was defective in form nor that peons in executing the warrant did anything more than the duties imposed upon them by the warrant nor that they acted otherwise than in good faith. They offered the notice to the petitioner Puna Mahton which he declined to receive. It cannot be disputed that the notice was nonetheless properly served and effective in law nor that Puna Mahton was bound

in accordance with the notice to appear before the Court on the day named in the notice. The peons then proceeded to execute the warrant. They seized Puna who asked his labourers to run and inform his people. Puna resisted the arrest by sitting down and refusing to move. The other two petitioners Gajadhar and Lachhman came with a number of persons and pushed the two peons aside whereupon Puna also forcibly pulled himself free of their grasp. Puna was convicted under S. 225-B, I. P. C., and fined Rs. 200 or in default rigorous imprisonment for four months. Gajadhar and Lachhman were convicted under Ss. 353 and 225-B and sentenced to a similar penalty. The appellant confined their defence to a denial of the facts alleged by the prosecution and on appeal took a similar course. In this Court however Mr. Baldeo Sahay has on their behalf confined himself to the legal argument that the arrest by the peons was unlawful and that the conduct of the petitioners therefore amounts to no offence in law.

Now a great number of cases have been decided upon the effect of the two sections in question and S. 186, I. P. C., and much learning has been devoted to a consideration of what is meant by such phrases as "a public servant in discharge of his public function," "lawful apprehension," "lawful detention" and "execution of his duty as a public servant." I do not propose to review in detail this long series of cases. I was at first somewhat puzzled by their number and apparent conflict but upon examination I find that in the great majority the public officer to whom resistance or violence was offered was armed with an authority which was defective in form or he exceeded the powers given to him by the authority when the authority itself was not defective. The last case decided in this Court on this point, was that of *Badri Gope v. Emperor* (1) and is an illustration of this class of case. The warrant of attachment was defective in that it did not bear the seal of the Court and the attachment was consequently illegal. It was held that the judgment-debtor and other persons who obstructed the peon and rescued the cattle which he attached had com-

(1) A. I. R. 1926 Pat. 237=27 Cr. L. J. 418=5 Pat. 216=93 I. C. 146.

mitted no offence under S. 186, I. P. C. It is therefore hardly necessary to examine this class of case. Nevertheless some passing observations may be made. Firstly, even in such cases it is not lawful for any person to offer to the peon more violence than is strictly necessary to resist the unlawful attachment and secondly, under S. 99, I. P. C.:

— "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done or attempted to be done by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly justifiable by law."

This part of the section protects the public servant against the right of private defence even if the authority be defective in minor particulars or even if the officer exceeds his duty in a minor particular and it merely leaves the right of private defence open when the alleged authority is no authority at all and is wholly defective in form or the officer goes clearly and widely outside the duties imposed on him: see *Queen Empress v. Poomalai Udayan* (2). If the authority has no defect the section has no operation see *Queen Empress v. Janak Prasad* (3).

For the purpose of deciding this case I have to consider facts of a different nature. As I have pointed out a mistake was made by the executing Court in exercising its discretion to issue to the peons a warrant of arrest after it had already issued a notice for appearance and before the expiry of the term specified in the notice, nevertheless in the hands of the peon there was a warrant of arrest complete in itself and exhibiting no defect of form. It was the duty of the peons to execute that warrant and it was no part of their duty to ascertain whether the executing Court had properly exercised its undoubted legal discretion to issue that warrant. To hold otherwise would impose upon the peons a duty which to say the least of it would require the state to secure peons of a somewhat higher standard of education and to pay them a higher salary. The duty of an officer who goes to carry out the orders of the Court are limited to seeing that the orders are on the face of them within the power of the Court and that they exhibit no defect in form. Apart from this it is no part of his duty

to review the discretion of the Court. Similarly it is his duty to carry out the orders given to him and not to go beyond such orders. It is of no use to the accused under these sections to criticise the action of the Court which issued the orders. I agree with the decision in *Preo Lal Mukerji v. Emperor* (4).

In this case the apprehension of Puna Mahton by the peons was a lawful apprehension however mistaken the executing Court may have been in exercising its discretion to direct that apprehension and escape from and obstruction to that apprehension are unlawful acts under S. 225-B, I. P. C. Similarly under S. 353, I. P. C, the pushing by the accused persons of the peons not being justified in law was an assault. In my opinion the petitioners were rightly convicted and I dismiss their applications.

K.N./R.K. *Application dismissed.*

(4) A. I. R. 1914 Cal. 908=15 Cr. L. J. 427=24 I. C. 163.

A. I. R. 1932 Patna 317

COURTNEY-TERRELL, C. J. AND FAZL ALI, J.

Banarsi Prasad—Appellant.

v.

Hare Kishun Radhey Kishun — Respondents.

Appeal No. 106 of 1931, Decided on 15th February 1932, against appellate order of Addl. Dist. Judge, Patna, D/-2nd February 1931.

(a) Civil P. C. (1908), S. 144—No question of restitution arises where appellant is not deprived of possession owing to lower Court's decree.

A obtained a decree against B and attached certain moveables and sold part of them in execution. The money remained in Court. C brought a suit claiming that the moveables belonged to him and got an injunction which was withdrawn on the dismissal of the suit. In the meanwhile D obtained a decree against B and compromised it with D on receipt of part of the moveables which had remained unsold. Then C appealed successfully against the dismissal of his suit and claimed restitution against D.

Held: that S. 144 has no application to the facts of the case and C was free to execute his decree and as he was never in possession of the property it cannot be said that he lost possession owing to the lower Court's decree: A. I. R. 1924 Cal 769, Ref. [P 319 C 1]

(b) Civil P. C. (1908), S. 144—Order passed on footing that case is governed by S. 144 is appealable—Civil P. C. (1908), S. 2.

The application to the lower Court was made expressly under S. 144 and the Judge dealing with the matter purported to act under S. 144 read with S. 151:

(2) [1893] 21 Mad. 296=1 Weir 135.

(3) [1886] 8 All. 293.

Held: that the order passed by the lower Court on the footing that the case was governed by S. 144 was appealable. [P 319 C 1]

Janak Kishore—for Appellant.

Syed Nurul Hossain, B. C. Sinha and Jugul Kishore Prasad—for Respondents.

Fazl Ali, J.—The point to be decided in this appeal is whether the appellant is entitled to an order of restitution with respect to some five bales of cotton which were made over to the respondent by one Radha Kishun Choudhry under a compromise. It appears that the Co-operative Society at Allamganj obtained two decrees against Radha Kishun Choudhry and in execution of its decree attached eighteen bales of cotton which were then in the possession of Radha Kishun Choudhry and which were alleged to belong to him. Ten of these bales which were sufficient to satisfy the decree obtained by the Co-operative Society were sold on 11th October 1928 and the sale-proceeds remained in the custody of the Court. While this execution proceeding was in progress the appellant brought a suit claiming that the eighteen bales of cotton belonged to him and not to Radha Kishun Choudhry. While the suit was pending the Court issued an injunction against the Bank as well as Radha Kishun Choudhry directing them not to deal with the bales of cotton pending the decision of the suit. The suit was ultimately decided against the plaintiff and the injunction was withdrawn. Meanwhile the firm of Hare Kishun Radha Kishun had obtained a decree against Radha Kishun Choudhry and proceeded to attach the eight bales of cotton which were still lying in Court. Subsequently a compromise petition was filed by Radha Kishun Choudhry and the respondent firm under which five bales of cotton were made over to the latter in satisfaction of its decree whereas three bales were taken away by Radha Kishun Choudhry.

The appellant in the meantime had preferred an appeal which was ultimately allowed and the decree of the trial Court was reversed. Thereupon he applied under S. 144, Civil P. C., for the restitution of the five bales of cotton which had been made over to the respondent firm by Radha Kishun Choudhry. The Subordinate Judge before whom the application was made directed restitu-

tion holding that the case was governed by S. 144 read with S. 151, Civil P. C. The firm of Hare Kishun Radha Kishun then preferred an appeal before the District Judge who reversed the order passed by the Subordinate Judge as he was inclined to take the view that S. 144 had no application to the facts of the case. The appellant decree-holder therefore preferred this appeal. The first point to be considered is whether S. 144, Civil P. C., has any application at all to the present case. That section runs thus:

“Where and in so far as a decree is varied or reversed the Court of first instance, shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed.”

It is to be remembered that in the present case the appellant was never in actual possession of any bales of cotton. It is true that an injunction was issued by the Court which tried his suit restraining the Co-operative Society of Allamganj and Radha Kishun Choudhry from dealing with the bales pending the decision of the suit but that injunction was withdrawn as soon as the suit was decided against the appellant by the trial Court. The fact however remains that the appellant was never in possession of the bales of cotton and although they were actually lying in Court, yet, at the time when they were attached at the instance of the Co-operative Society they were in the possession of Radha Kishun Choudhry. On a careful reading of S. 144 it will be plain that it is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers some money or property from the judgment-debtor and then the decree is reversed which necessitates restitution of the property or money which the judgment-debtor had to part with at the instance of the Court on the ground that the decree is no longer in force. Here no question of restitution can arise because the decree-holder is still free to execute his decree and it is not his case that as result of the decree of the trial Court the bales were taken out of his possession. In *Barkuntha Nath v. Prosannamoyi Debi* (1) a Bench of the Calcutta High Court

(1) A. I. R. 1924 Cal. 769=81 I. C. 571=51 Cal. 324.

dealing with the question as to the class of cases to which S. 144 has application made these observations which appear to me to be highly pertinent to this case:

"Now in the present case, the properties were never in the possession of the appellant, they were not taken out of his possession and made over to the respondent under any decree or order of Court. They were in the possession of the respondent at the time, and it was because the respondent had opposed the commissioner in making an inventory of the articles that they were locked up in a room under seal, the keys remaining with the commissioner. That custody of the commissioner was removed upon the application of the respondent and the properties delivered to her upon the application of the respondent when the probate case was decided in her favour by the High Court. It is to be observed that no administrator pendente lite had been appointed by the Court.

The probate Court could not, after the decision of His Majesty in Council, direct the properties to be made over to the appellant by way of restitution, because they had never been in his possession nor taken out of his possession. The appellant is in the same position which he would have occupied but for the order of the High Court which has been reversed by His Majesty in Council."

It appears to me therefore that S. 144 has no application to the facts of this case and that the view taken by the learned District Judge is correct. It is next urged that if S. 144 has no application, the order passed by the Court of first instance must be taken to have been passed under S. 151, Civil P. C., which section has been expressly referred to by the Court in its decision. That being so, it is contended that the order passed by the Court of first instance was not appealable and the order of the District Judge must be vacated as being without jurisdiction. The plain answer to this argument is that the application by the appellant to the Subordinate Judge was made expressly under S. 144 and the Subordinate Judge dealing with the matter purported to act under S. 144 read with S. 151, Civil P. C. If therefore the order was passed by the Subordinate Judge on the footing that the case was governed by S. 144 it was certainly appealable and the District Judge had complete jurisdiction to deal with the matter in the way he has. In the circumstances I would dismiss this appeal with costs.

Courtney-Terrell, C. J.—I agree.

M.N./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 319

KULWANT SAHAY, J.

Jogendra Narain Singh and another—
Plaintiffs—Petitioners.

v.

Radha Prosad Singh and another —
Defendants—Opposite Parties.

Civil Revn. No. 13 of 1932, Decided on 1st September 1932, against order of Sub-Judge, Deoghar, D/- 8th October 1931.

(a) Court-fees Act (1870), S. 7 (5) (d) and Sch. 2, Art. 17 (6)—Suit for declaration and possession of Kunjora Ghatwali tenure—Suit held fell under S. 7 (5) (d) and not Sch. 2, Art. 17 (6)—Kanjora Ghatwali not being definite share of revenue paying estate court-fee on market value ought to be given.

The plaintiff sued for a declaration that he was ghatwal of the Kunjora ghatwali and for possession of the same. The suit was valued approximately at Rs. 30,000 and court-fee was paid on Rs. 1,100 which was ten times the revenue payable in respect of the ghatwali in view of the prayer for possession and a further court-fee of Rs. 15 was paid in view of the declaratory relief claimed in the suit. The Sub-Judge calculated the ad valorem court-fee upon Rs. 51,010;

Held: that the case did not fall within Art. 17, Cl. (6), Sch. 2, but within S. 7, Cl. (5), sub-Cl. (d).

Held further, that the Kanjora Ghatwali though a part of an estate paying revenue to Government is not a definite share of such an estate and is not separately assessed to Government revenue, and therefore the court-fee had to be calculated on the market value of the land. [P 321 C 1]

(b) Court-fees Act (1870)—Scope.

A valuation cannot be accepted if it appears on the face of it not to be a reasonable valuation. [P 321 C 1]

(c) Civil P. C. (1908), S. 115—Court-fees—Interlocutory order demanding additional court-fees is not interfered in revision.

The High Court will not interfere in revision with an interlocutory order deciding an issue as to court-fees and demanding additional court-fee from the plaintiff as he has another remedy open to him by way of appeal against the subsequent order rejecting his claim. [P 321 C 1]

A. B. Mukerji and D. C. Varma — for Petitioners.

*Rai Gurusaran Prasad, S. N. Ray and S. S. Bose—*for Opposite Parties.

Judgment. — This is an application on behalf of the plaintiffs against the decision of the Subordinate Judge of Deoghar deciding three preliminary issues raised in the suit. These were issues 1, 2 and 3 and they are in the following terms: "(1) Is the court-fees paid sufficient? (2) Has the suit been properly valued? (3) Is the suit maintainable in this Court?" He an-

swered the first two issues against the plaintiffs and issue 3 in favour of the plaintiffs. As regards the first two issues he found that the suit ought to be valued at Rs. 51,040 and ad valorem court-fees should be paid upon this sum amounting to Rs. 1,785-8-0. The plaintiffs had paid a court-fee of Rs. 105 only and therefore it was declared that they were liable to pay a further sum of Rs. 1,680-8-0. By an order in the order-sheet dated 8th October 1931 the plaintiffs were allowed time till 16th November to pay the deficit court fee of Rs. 1,680-8-0. The plaintiffs took time on 16th November and again on 16th December from the Subordinate Judge to pay the deficit court-fee. They filed the present application in this Court on 6th January 1932, challenging the correctness of the decision of the Subordinate Judge on the first two issues. The suit was for a declaration that plaintiff 1 was the ghatwal of the Kunjora ghatwali which is one of the Birbhum ghatwalis and is governed by Regn. 29 of 1814. Plaintiff 1 was dismissed from the office of ghatwal by an order of the Commissioner of Bhagalpur dated 15th March 1930, the dismissal taking effect from 1st April following, and defendant 1 was appointed ghatwal in his place. Plaintiff 2 is the son of plaintiff 1 and their case is that the office of ghatwal in this ghatwali descends from father to son and that no third person can be appointed. Plaintiff 1 alleged that his dismissal was unlawful. He then stated that if he could not be retained in the office of ghatwal then his son plaintiff 2 ought to be appointed and not defendant 1. Defendant 2 is the Secretary of State for India in Council. The reliefs asked for in the plaint are these :

“(1) That it be declared that Kunjora is a ghatwali tenure which the holder thereof is entitled to hold generation after generation in perpetuity subject to the payment of the fixed and established rent and the performance of certain duties for the maintenance of the public peace and support of the police. (2) That it be declared that the plaintiff first party as the ghatwal of the said ghatwali tenure and his descendants in perpetuity are entitled to be maintained in possession of the said tenure and of the lands comprised therein as long as they pay the revenue assessed upon it. (3) That it be declared that the dismissal of the plaintiff first party from his office of ghatwal is improper, illegal and ultra vires. (4) That it be declared that assuming that the plaintiff first party was liable to dismissal for any just cause, the plaintiff second party as

his descendant was in law entitled to and eligible for appointment of the office of ghatwal in his place and that the appointment of the defendant first party is inequitable, illegal, contrary to law and without jurisdiction. (5) That it be declared that the possession of the defendant first party over the ghatwali of Kunjora is wrongful and that the plaintiff first party or the plaintiff second party is entitled to possession. (6) That the plaintiff 1st party or the plaintiff second party as to the Court may seem fit and proper be put in possession of the said ghatwali Kunjora and mesne profits be awarded to either of them from the date of the suit till recovery of possession. (7) That costs of the suit with interest thereon be awarded to the plaintiffs or to whichever of them may seem entitled thereto. (8) That further and other reliefs be granted to the plaintiffs or to either of them as in the circumstances of the case they may seem to be entitled thereto.”

In para. 17 of the plaint the cause of action for the suit was stated to have arisen on 1st April 1930 the date of dismissal of the plaintiff first party and on 3rd September 1930, the date on which the defendant first party was put into possession. In para. 18 of the plaint it was stated that the said ghatwali the subject-matter of the suit is valued approximately at Rs. 30,000 and court-fee was paid on Rs. 1,100 which was ten times the revenue payable in respect of the ghatwali in view of the prayer for possession and a further court-fee of Rs. 15 was paid in view of the declaratory relief claimed in the suit. The learned Subordinate Judge has found that the suit had not been correctly valued. He took the income of the ghatwali tenure to be Rs. 4,491-12-0 as appearing in the settlement papers filed on behalf of the defendants. From this amount he deducted Rs. 107-11-9 on account of revenue, Rs. 391 as chaukidari tax, Rupees 140 as road cess, Rs. 450 as collection charges at 10 per cent on the net annual income, and the balance left was Rupees 3,402-10-4½. Having regard to the restrictions imposed on the ghatwali tenures as regards alienations he calculated the valuation at 15 times the net annual income and this gave the valuation of Rs. 51,040 upon which he has calculated the ad valorem court-fee.

The first point taken by Mr. Abani Bhusan Mukharji on behalf of the plaintiffs that the present suit came within Sch. 2, Art. 17, Cl. (6), Court-fees Act, his contention being that the suit was such that it was not possible to estimate at a money value the subject-matter in dispute. His contention was that the

suit was in fact a suit for a declaration that the plaintiff was entitled to the office of ghatwali and for an order that plaintiff 1 may be reinstated to his office or that plaintiff 2 may be appointed to that office and that no estimate can be formed as regards the money value of such a subject-matter in dispute between parties. This contention however cannot be accepted in view of the plaintiff's own statement contained in para. 18 of the plaint where he did estimate the value of the suit at Rs. 30,000 and he did pay a court-fee on Rs. 1,100 which was ten times the revenue payable in respect of the ghatwali property. It is clear therefore that the case does not fall within Art. 17, Cl. (6), Sch. 2 to the Court-fees Act. It is next contended that assuming that the subject-matter of the suit is capable of valuation then the correct procedure ought to be to accept the valuation as given by the plaintiff. Mr. Abani Bhusan Mukharji however concedes that the valuation cannot be accepted if it appears on the face of it not to be a reasonable valuation.

The learned Subordinate Judge has held that the case falls within S. 7, Cl. (5), sub Cl. (d), Court-fees Act. The Kunjora ghatwali is a part of an estate paying revenue to Government but it is not a definite share of such an estate and is not separately assessed to Government revenue, and therefore the court-fee has to be calculated on the market value of the land. He is supported in his decision by *Chandra Narayan Singh v. Asutosh De* (1) in which a similar question arose with respect to the Rohini ghatwali which is also one of the Birbhum ghatwalis. It was held there that the proper court-fee payable on a suit like the one now before us is under sub-Cl. (d), Cl. (5), S. 7, Court-fees Act. The question then remains what is the market value of the property the subject-matter in dispute. It cannot be said that it has no value inasmuch as the plaintiffs themselves described it as a tenure. The settlement papers show that the income to the ghatwali from this ghatwali is as stated by the Subordinate Judge. The learned Subordinate Judge has calculated the value after deducting the various charges from the income at 15 times the net annual income. It cannot be said that that

is not a fair estimate of the value of the subject-matter in dispute in the present case. I am therefore of opinion that the valuation as fixed by the Subordinate Judge is correct.

An objection was taken on behalf of the defendants that an application in revision does not lie against a decision on one of the preliminary issues raised in the suit. The decisions on this point of this Court are not uniform. In one of the latest decisions of this Court in *Sham Narain Singh v. Basudeo Prasad* (2) it was held that the High Court will not interfere in revision with an interlocutory order deciding an issue as to court-fees and demanding additional court-fee from the plaintiff as he has another remedy open to him by way of appeal against the subsequent order rejecting his claim. I am inclined to think that this is the correct view to take on the point and I am of opinion that a revisional application against the decision of the Subordinate Judge deciding an issue as regards court-fee does not lie to this Court. On both these grounds therefore this application must be dismissed. The opposite party are entitled to their costs: hearing fee two gold mohurs to the defendants first party and two gold mohurs to the defendant second party.

P.N./R.K.

Rule discharged.

(2) A.I.R. 1930 Pat. 277=122 I. C. 152.

A. I. R. 1932 Patna 321

ROWLAND, J.

Gulab Chand Ranka and another—
Petitioners.

v.

Mt. Kalabati Sarkarin — Opposite Party.

Civil Revn. No. 24 of 1932, Decided on 4th May 1932, against order of Munsif, Purnea, D/- 21st November 1931.

(a) Civil P. C. (1908), S. 152—**Accidental and unintentional errors in formal expression of order can be corrected.**

Section 152 does authorise a Court to remedy, as far as it can, errors in the formal expression of its order, occasioned by its own indolence. Where there is no doubt what the compromises were and there is no doubt that the Court intended those compromises to be embodied in its order the fact that they were not so embodied was due to the grossest negligence, and therefore the order was capable of correction under S. 152 : 21 I. C. 115, *Rel. on.* [P 322 C 2]

(1) A.I.R. 1914 Cal. 442=23 I. C. 89=41 Cal. 812.

(b) Civil P. C. (1908), S. 152—Power of successor is wider than under Civil P. C. (1908), O. 47, R. 2.

The power given by the S. 152 is a wider power than that conferred by O. 47, R. 2, on the successor of a Court passing an order.

[P 322 C 2]

Pandey N. K. Sahay—for Petitioners.

Judgment.—This is an application in revision against the order of the Munsif of Purnea refusing to grant review or amend the order of his predecessor disposing of an application under O. 21 R. 90, Civil P. C. on the basis of a compromise. The petitioners were the holders of a decree for Rs. 1,166 odd in execution of which the property of the judgment-debtor was attached and put up to sale on 14th September 1924. The decree-holders purchased the property and the sale was confirmed. Delivery of possession was taken on 17th January 1925. The judgment-debtor addressed to the Court on 26th March 1925 an application under O. 21, R. 90 to set aside the sale. The application was disposed of on the basis of a compromise petition filed by both parties on 21st August 1925, the terms of which were that in full satisfaction of the decree, judgment-debtor was to pay Rs. 801 by instalments for which periods were fixed; that on payment of the said amount the sale should be set aside, but that on failure to pay the said amount according to the instalments, the sale and delivery of possession in favour of the decree-holders auction-purchasers should stand. The order recorded by the Court however instead of giving effect to the terms of this compromise and directing that the sale should stand unless and until the decretal amount was paid off in the manner provided for runs as follows:

"A compromise petition filed by parties. Application allowed on compromise. Sale is set aside."

It is said that the instalments due have not been paid. The petitioners moved the Munsif in 1930 to amend the order under Ss. 151, 152 and 153, Civil P. C. or in the alternative to review the order in accordance with the provisions of O. 47, R. 1, Civil P. C. The Munsif refers to the provision of O. 47, R. 1 and has said that an application for review under this order can only be made to the Judge who passed the original order, unless it is based on either the discovery of new and important matter or evidence or a clerical or arithmetical

mistake. Being of opinion that the mistake is not clerical or arithmetical, he comes to the conclusion that it is not open to him to entertain the application under O. 47, Rr. 1 and 2. As regards Ss. 151, 152 and 153, all that he says is that he thinks these sections do not confer any power of revision on his Court. S. 151 no doubt does not directly confer any particular power on the Court. It is a general section saving the existing inherent jurisdiction of every Court but not conferring any new power. S. 153, it has been conceded at the hearing, is not directly applicable. For the petitioners however S. 152 is directly relied on and this section might well have been examined by the Munsif before he declined to exercise jurisdiction in the matter. It is laid down that not only clerical or arithmetical mistakes in judgments, decrees or orders, but errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties. The power given by the section is a wider power than that conferred by O. 47, R. 2 on the successor of a Court passing an order. The application of the section has been considered in several cases of which it will be sufficient to cite *Muttiar Rahman v. Harendra Nath Mukherjee* (1). That case, like the present one, referred to a litigation which had been adjusted by a compromise between the parties. A decree was drawn up which failed to give effect to the terms of the compromise and the plaintiffs came to Court praying that the decree might be amended and brought into conformity with the compromise. It was observed in the course of the judgment:

"If S. 152 does not authorise a Court to remedy, as far as it can, errors in the formal expression of its order occasioned by its own indolence, it is difficult to appreciate the use of the section. Here there is no doubt what the compromises were. Nor is there any doubt that the Court intended those compromises to be embodied in the decree. The fact that they were not so embodied was due to the grossest negligence but it cannot be supposed that the decree was drawn up in this form and accepted by the Court and the pleaders intentionally. Its form therefore may reasonably be regarded as unintentional and accidental and therefore capable of correction under S. 152"

Those observations apply to the case before me with the modification that in

(1) [1913] 21 I. C. 115.

this instance no formal decree was drawn up. There can be no doubt whatever that the order passed on the compromise petition embodied an error arising from an accidental slip or omission and therefore within the terms of the section the Court had and has power at any time to correct the mistake either of its own motion or on the application of any of the parties.

The application is allowed. Let the record be sent back to the Munsif with the direction to correct the order and bring it in conformity with what must have been the intention of the Court. The opposite party has not appeared and in the circumstances of this case, I shall make no orders as to costs as there was considerable delay in moving the Court below for amendment of the order.

M.N. *Application allowed.*

A. I. R. 1932 Patna 323

COURTNEY-TERRELL, C. J. AND
FAZL ALI, J.

Kalu Ram and others—Appellants.

v.

Sheonand Rai Jokhi Ram—Respondent.

Misc. Appeal No. 111 of 1931, Decided on 22nd February 1932, against order of Sub-Judge, Darbhanga, D/- 24th February 1931.

Civil P. C. (1908), O. 21, R. 50 (2)—Leave must be obtained from Court which passed decree and not executing Court—S. 42 does not give latter this jurisdiction—Civil P. C. (1908), S. 42.

The leave of the Court required under R. 50, sub-R. (2) has to be obtained from the original Court which actually passed the decree and not the Court which is executing it on transfer. S. 42 cannot be applied to give the executing Court this jurisdiction and it cannot be construed to mean that by going to the executing Court a litigant was entitled to obtain the same reliefs that he would be able to obtain if he had gone to the Court which passed the decree: *A. I. R. 1921 All. 199, Diss. from; 27 Cal. 488 and 25 All. 433, Ref.* [P 324 C 1]

G. P. Das—for Appellants.

S. M. Mullick and R. Misra—for Respondent.

Courtney-Terrell, C. J.—In this case firm Sheonand Rai Jokhi Ram, sued a firm named Ganpat Rai Hanuman Bux situated at Jayanagar in the district of Darbhanga in the High Court of Fort William in Bengal to recover a sum of money and obtained a decree against the defendant firm for that sum and the case

was transferred to the Court of the Subordinate Judge at Darbhanga for the purpose of executing the decree. There the decree-holders applied, purporting to act under O. 21, R. 50, Civil P. C., for execution of the decree against five persons who are the appellants before us alleging that they were partners in the defendants' firm of Ganpat Rai who were defendants in the suit in Calcutta. An objection was taken that the executing Court had no jurisdiction to add the appellants to the proceedings or what is in effect to amend the decree passed by the Calcutta High Court. Now execution proceedings against a firm are provided for under O. 21, R. 50 in the most specific terms. That rule provides that where a decree has been passed against a firm execution may be granted:

(a) against any property of the partnership, (b) against any person who has appeared in his own name or who has admitted on the pleading that he is, or who has been adjudged to be a partner, (c) against any person who has been individually served as a partner with a summons and has failed to appear."

It is conceded that none of these provisions applies to the case of the appellants before us. Then by para (2) of the same rule it is laid down that where a decree-holder claims to be entitled to cause a decree to be executed against any person other than such persons as are referred to in para 1. I have quoted as being a partner in the firm he may apply to the Court which passed the decree for leave and then the rule goes on to say that the Court may deal with that application and determine the liability of such person against whom the application is made. It is perfectly clear that the words "the Court which passed the decree for leave" do not include the executing Court but in this case refers to the High Court of Calcutta and to no other Court. The words "Court which passed the decree" are mentioned in other rules and have universally been construed to mean not the executing Court but the original Court which actually passed the decree: see *Amar Chandra v. Guru Prosunno* (1), *Tameshar Prasad v. Thakur Prasad* (2). One would have thought that this was sufficient to deal with the case but the learned Subordinate Judge was induced by the citation of the case of *Sital Pra-*

(1) [1900] 27 Cal. 488.

(2) [1903] 25 All. 444 = (1903) A.W. N. 99.

sad v. Messrs. Clements Robson & Co. (3) to take a different view. The facts in that case are in the first place entirely different from the facts of this case. In the case before the Allahabad High Court execution was sought against two persons who had in fact appeared before the Court which passed the decree. They had denied their liability as partners but the High Court seems to have sent the case to the subordinate Court with a view to determine as to whether these persons were or were not partners so that the facts of that case are entirely different from the facts of this.

The High Court however proceeded upon a line of reasoning which, with the greatest respect, I am unable to follow. They based their decision partly upon a construction of S. 42, Civil P. C., which does not commend itself to me and indeed the reasoning of the learned Judges seems, if I may say so with respect, to be self-contradictory. S. 42 states that the Court executing the decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. That rule was construed in effect to mean that by going to the executing Court a litigant was entitled to obtain the same reliefs that he would be able to obtain if he had gone to the Court which passed the decree. Indeed at p. 402 the learned Judges say:

"The decree-holder is thus enabled to obtain what amounts to a decree upon the question of the liability without resorting to hazardous and infructuous proceedings against a person whose liability is doubtful,"

that is to say, he is enabled to obtain in fact the same sort of decree which might have been obtained but was not in fact obtained before the Court which passed the decree. To my mind this reasoning cannot be sustained and I am unable to follow it. There is in the case of suits against partners a very sound reason for compelling resort to the Court which passed the original decree. A person sued as a partner is entitled to dispute the plaintiff's claim upon its merits and quite apart from the question of his liability as a partner. If the construction contended for by the respondents were right it would enable a plaintiff to sue a firm and prevent a person against whom execution was intended and ultimately sought from disputing the claim upon its merits and

enable him to bring that person into the proceedings not in the suit but in the later stages of execution which would defeat the whole purpose of the procedure which has been provided for in dealing with suits against firms and against persons whom it is sought to be made liable as being members of the firm. In my opinion the judgment of the learned Subordinate Judge was erroneous and should be set aside. The proper course is for the plaintiffs to go to the High Court at Calcutta and apply under O. 21, R. 50 if they are so advised. I would allow this appeal with costs.

Fazl Ali, J.—I agree.

M.N.

Appeal allowed.

*** A. I. R. 1932 Patna 324**

DHAVLE, J.

Brijbhusan Pande and others—Petitioners.

v.

Ramjanam Kuer—Opposite Party.

Civil Revn. No. 43 of 1931, Decided on 20th May 1931, against order of Munsif, Chapra, D/- 22nd November 1930.

*** (a) Negotiable Instruments Act (1881), S. 20—Hand-note—Payee's name not mentioned—Decree on, cannot be passed.**

Where a hand-note does not mention the name of the payee at all, no decree can be passed on such instrument. The payee can fill in the blank instrument and unless he does so, he is not entitled to bring a suit and obtain a decree : 17 I. C. 915, Ref. [P 325 C 1]

(b) Negotiable Instruments Act (1881), S. 118—Hand-note not mentioning name of payee—Suit on—Onus is on plaintiff to prove that he made advance.

The presumptions under S. 118 that every negotiable instrument was made or drawn for consideration and that the holder of a negotiable instrument is a holder in due course do not arise in the case of a promissory-note which is not a negotiable instrument within the definition in S. 4 of the Act, and therefore in a suit based on hand-note which does not mention name of payee the onus is on the plaintiff to prove that he made an advance to the defendant and that the hand-note was executed in his favour: A. I. R. 1925 Lah. 272, Ref. [P 325 C 1, 2]

(c) Evidence Act (1872), S. 91—Hand-note defective—Suit on, can succeed on loan itself—Contract Act, S. 62—Promissory-note.

Where the plaintiff sues on a defective hand-note, the hand-note failing, he is entitled to sue on the loan itself, but he cannot do so without amending the plaint : A. I. R. 1928 Pat. 426, Ref. [P 325 C 2]

N. K. Sahay—for Petitioners.

Harihar Prasad Sinha—for Opposite Party.

Judgment.—This is an application under S. 25, Provincial Small Cause

(3) A. I. R. 1921 All. 199=43 All. 394=61 I. C. 401.

Courts Act, by the defendants in a suit for the recovery of Rs. 100, principal and interest, on the basis of a hand-note said to have been executed in favour of the plaintiff, by petitioner 2, as karta of joint family of the petitioners, for family necessity. The only petitioner who contested the suit was petitioner 2, who contended that he had executed the note not in favour of the plaintiff but in favour of one Godhan Singh whom he had paid off, the note however being missing at the time of the payment and afterwards coming somehow or other into the possession of an enemy Ramsubhag Dubey, a friend of the plaintiff opposite party. The learned Munsif framed the first point for decision as follows :

"Is the defence story regarding the hand-note correct and whether the plaintiff is entitled to a decree for the amount claimed?"

He came to the conclusion that the entire defence theory was false, and he then proceeded to observe that the plaintiff had satisfactorily proved that he had advanced the loan in question to the defendant and got the hand-note from him. He therefore decreed the suit. The learned advocate for the petitioners points out that the hand-note in suit, Ex. 1, does not mention the name of the payee at all, and he has urged that no decree can be passed on such an instrument; under S. 20, Negotiable Instruments Act, it was open to the payee to fill in the blank instrument, but unless he did so, he is not entitled to obtain any decree, *M. P. P. L. Firm v. Kirwan Gyan* (1). He has also urged that the hand-note which did not contain the name of the payee could have been filled in by the holder and was thus a promissory-note payable to bearer. Promissory-notes payable to bearer on demand, unless drawn on bankers, shroffs or agents are however prohibited by S. 25, Paper Currency Act (10 of 1903), and no suits can be maintained on them: *Chidambaram Chettiar v. Ayyasami Thevan* (2) and *Nachimuthu Chetty v. Andiappa Pillai* (3). The learned advocate has further urged that the presumptions under S. 118, Negotiable Instruments Act, that every negotiable instrument was made or drawn for consideration and that the holder of a negotiable instrument is a holder in due course do not arise in the case of a

promissory-note which is not a negotiable instrument within the definition in S. 4 of the Act, and that therefore in this case the onus was on the plaintiff to prove that he had made an advance to the defendant and that the hand-note was executed in his favour: *Barketullah v. Muhammad Hayat Ali Khan* (4).

These contentions are not resisted by the learned advocate for the opposite party though I may perhaps incidentally observe that there is reason to doubt whether the definition of "holder" in S. 8, Negotiable Instruments Act, covers "bearer" but has urged that the lower Court has decreed the suit upon a consideration of all the evidence and has found that the plaintiff has satisfactorily proved that he advanced the loan in question and got the hand-note from the defendant; and he has further urged that the plaintiff was entitled to succeed on the loan itself, if for technical reasons he was not entitled to succeed on the hand-note. The ruling in *Dhaneshwar Sahu v. Ramrup Gir* (5), which has been cited by the learned advocate, supports the contention that the hand-note failing the plaintiff was entitled to sue on the loan itself. It cannot however be said, in the present case that the plaintiff sued on the loan and not on the hand-note alone. It is also clear that the lower Court placed the onus on the defendant in the same manner as if S. 118, Negotiable Instruments Act, had applied in the circumstances of the case. It is impossible to say what the result would have been if the lower Court had been asked to approach the matter from the point of view that is now urged before me, namely, that the plaintiff was suing not upon the hand-note but upon the loan. Nor can the matter be approached from that point of view without an amendment of the plaint which may or may not now be open to the plaintiff. The loan was small, namely, Rs. 60 only, but in view of the illegalities and difficulties pointed out on behalf of the petitioners, to say nothing of the vexed question of the liability of the joint family it is impossible to let the decree below stand. Mr. P. P. Verma as amicus curiae has placed me under obligation by referring to *Sheonandan Pandey v.*

(1) [1912] 17 I. C. 915.

(2) [1917] 40 Mad. 585=36 I. C. 741.

(3) [1917] 42 I. C. 706.

(4) A. I. R. 1925 Lah. 272=84 I. C. 866.

(5) A. I. R. 1928 Pat. 426=7 Pat. 845=111 I. C. 482.

Ramdhan Pandey (6) disposed of by Kulwant Sahay, J., on 17th December 1930, in which that learned Judge found that the lower Court had misplaced the onus in a suit on a hand-note and accordingly remanded the case for a fresh hearing after placing the onus of proof upon the right party.

I set the decree of the lower Court aside and direct that the case be retried after proper opportunity given to the plaintiff to amend his plaint if he so desires and satisfies the lower Court that an amendment ought now to be allowed. Costs so far will be borne by the plaintiffs opposite party, hearing fee one gold mohur.

K.N./R.K.

Decree set aside.

(6) Civ. Rev. No. 55 of 1930.

A. I. R. 1932 Patna 326

KULWANT SAHAY AND JAMES, JJ.

Jadunandan Prasad Bhagat and another—Judgment-debtors—Appellants.

v.

Wajid Ali Mian and another—Decree-holders—Respondents.

Appeal No. 287 of 1930, Decided on 29th January 1932, against original order of Sub-Judge, Santal, Parganas, D/- 17th November 1930.

Civil P. C. (1908), O. 21, R. 90—Application for setting aside sale raising issues of fact depending upon evidence—Parties must be given opportunity to adduce evidence.

A practice of disposing of applications under O. 21, R. 90, without taking evidence is not warranted by law and unless the allegations contained in petitions for setting aside sales be such as not to raise issues of fact depending upon evidence but be such as can be disposed of without taking evidence, it is the clear duty of the Court to give the parties proper opportunity to adduce evidence before he can dispose of them.

[P 327 C 1]

S. M. Mullick and S. C. Mazumdar—for Appellants.

G. P. Das and P. Misra—for Respondents.

Kulwant Sahay, J.—This is an appeal by some of the judgment-debtors against the order of the Subordinate Judge of Pakur, dismissing their application for setting aside a sale under O. 21, R. 90, Civil P. C. The sale was held in execution of a compromised decree on 12th July 1930 for a sum of Rs. 3,100 subject to an encumbrance of Rs. 1,800. The ground taken by the learned advocate for the appellants is that their objection under O. 21, R. 90 was dismissed by the

Subordinate Judge summarily without taking any evidence. It appears from the application filed under O. 21, R. 90 that the allegations made in it were such as required evidence to prove them. For instance, the allegations were that the sale proclamation was not at all published, that one of the judgment-debtors was dead more than two years ago, and the execution could not proceed without amendment of the execution petition in respect of the deceased judgment-debtor, that the price fetched at the sale was wholly inadequate and that there was material irregularity and fraud in conducting and publishing the sale and that the inadequacy of price was due to such irregularity and fraud. Allegations such as those could not be established without evidence. It appears from the order sheet that on receipt of this application the learned Subordinate Judge made an order on 11th August 1930 to put it up with the record.

The next order in the order sheet is dated 12th August 1930 which is to the effect that the petition will be heard and notice was directed to be given to the decree-holder and the auction purchaser, fixing 11th September 1930. The order-sheet shows that on 11th September the appellant was present and the decree-holder was also represented, but that the auction-purchaser had not been properly served and the order made on that date was to issue notice to the auction-purchaser fixing 31st October 1930. These orders appear to have been passed at Pakaur. The next order of 31st October 1930 has an endorsement in the margin which, according to the learned advocate for the appellant, is Amrapara, and the learned advocate states that this order of 31st October 1930 was passed when the Subordinate Judge was in camp at Amrapara at a distance of 32 miles from Pakaur. The order of 31st October shows that both sides were represented by pleaders and arguments were heard, and the learned Subordinate Judge fixed 15th November 1930 for orders. On 15th November 1930, the order sheet shows that orders could not be passed as he had not gone through the record and he directed it to be put up on 17th November for orders. The order of 17th November shows that pleaders were again heard on that date and by this order he dismissed the application as frivolous. It

is against this order of 17th November 1930 that the appellants have come in appeal to this Court.

From the order of 17th November 1930 there seems to be no doubt that the learned Subordinate Judge disposed of the application on some sort of preliminary hearing without taking any evidence. The decree-holder had filed a petition refuting the allegations made by the judgment-debtors. The allegations contained in the judgment-debtor's petition and the decree-holder's petition of refutation surely raised issues of fact which could not be decided without taking evidence ; but it appears from the order of 17th November 1930 that the learned Subordinate Judge thought that he could decide the points without taking evidence upon the allegations contained in the petition and upon the facts appearing on the record of the execution case itself, after hearing the pleaders of the parties. Mr. Sushil Madhab Mullick states that there has grown up a practice in the Court of the Subordinate Judge to dispose of applications under O. 21, R. 90 without taking evidence. There is nothing before us to show that such a practice has grown up. If such a practice has grown up, it ought to be put a stop to as early as possible. A practice such as this is not warranted by law, and unless the allegations contained in petitions for setting aside sales be such as not to raise issues of fact depending upon evidence but be such as can be disposed of without taking evidence, it is the clear duty of the Court to give the parties proper opportunity to adduce evidence before he can dispose of them. The learned Subordinate Judge thought that he could dispose of the allegations contained in the judgment-debtor's petition in the present case without evidence, and this is clear from his observations made in his order of 17th November. For instance, in dealing with the allegation about the non-publication of the sale-proclamation the learned Subordinate Judge says :

" the objections about the sale proclamation not being made duly and other minor objections of the same kind are all frivolous and have been made for the sake of objection only."

If it was a fact, as is contended for by the learned advocate for the respondent, that the judgment-debtor did not choose to adduce evidence, the easiest thing for

the learned Subordinate Judge would have been to say that there was no evidence as regards the allegations of fact contained in the petition and that those allegations had not been proved and then to dismiss the application. He however does not deal with the allegations and say that they have not been proved but states that the objections taken were frivolous. Again, in dealing with the question as to the death of one of the judgment-debtors the learned Subordinate Judge does not say that there is no evidence to prove the fact of death, but what he says is that " such baseless allegations are made to frustrate the ends of justice."

Then again as regards the allegations of the judgment-debtor that the auction-purchaser was a mere benamidar for the decree-holder and that the purchase was made against the provisions of O. 21, R. 72, Civil P. C., the learned Subordinate Judge says that " it is usual to make such baseless allegations in order to frustrate the ends of justice."

Having regard to the observations made above, I am satisfied that the learned Subordinate Judge disposed of the application under O. 21, R. 90 summarily without taking evidence and without giving opportunity to the parties to adduce evidence and without hearing such evidence. In these circumstances, the order of the learned Subordinate Judge must be set aside and the case remanded to him for re-hearing, after giving the parties opportunity to adduce evidence and for decision of the case according to law.

James, J.—I agree.

P.N./R.K.

Case remanded.

A. I. R. 1932 Patna 327

KULWANT SAHAY AND JAMES, JJ.

Rameshwar Singh Bahadur—Plaintiff
—Appellant.

v.

Ram Charan Sahu and others—Defendants—Respondents.

Appeal No. 274 of 1928, Decided on 28th January 1932, against original decree of Sub-Judge, Purnea, D/- 15th September 1928.

Civil P. C. (1908). O. 20, R. 12—Joint and several decree for mesne profits against several defendants — Appeal for enhancement of mesne profits against some defendants only is not tenable.

Where a joint and several decree for mesne profits is passed against several defendants and in an appeal against the decree it is found that

some of the defendants-respondents are dead and the application to bring their legal representatives on record is rejected as time barred, the appeal cannot proceed against the surviving defendants only so as to enhance the amount of mesne profits awarded by the trial Court: *A. I. R. 1928 Cal. 180* and *14 W. R. 76, Foll.* [P 328 C 2]

Murari Prasad, K. P. Upadhyaya and R. Chaudhury—for Appellant.

S. N. Bose and A. Barman—for Respondents.

Kulwant Sahay, J.—This is an appeal by the plaintiff against the final decree in a proceeding relating to the ascertainment of mesne profits. It appears that the plaintiff instituted the suit for possession of certain immovable property and for mesne profits. There were fourteen defendants in the suit. A decree was passed in favour of the plaintiff on 20th January 1919 awarding him possession and declaring him entitled to mesne profits as against all the defendants which were ordered to be ascertained in a subsequent proceeding. This decree of the trial Court was affirmed on appeal by the High Court on 9th February 1922. In execution of this decree the plaintiff obtained delivery of possession on 7th August 1922, and on 30th March 1926 he made an application before the Subordinate Judge for ascertainment of mesne profits as against the fourteen defendants. A commissioner was appointed and after consideration of the commissioner's report, the learned Subordinate Judge made a final decree awarding a certain amount of mesne profits to the plaintiff on 15th September 1928. The plaintiff has filed the present appeal against this final decree claiming that the amount of mesne profits allowed by the learned Subordinate Judge is not sufficient and prays that his claim may be decreed in full.

It appears that notices of the appeal on two of the respondents, namely, respondent 1, Babu Raghunath Prasad Singh and respondent 18, Ram Bishun Singh were returned unserved with a report that they were dead. It appeared on an application filed by the plaintiff-appellant for substitution of the heirs of these two defendants that they had died before the passing of the final decree by the learned Subordinate Judge, and this Court thereupon rejected the application for substitution. The result therefore is that two of the defendants against whom the original decree was passed were dead at the time of the making of the final

decree for mesne profits and their heirs were not brought on the record either in the Court below or in this Court. Upon these facts a preliminary objection has been taken on behalf of the remaining respondents to the effect that the appeal could not proceed as against them. The contention is that the decree being for mesne profits and a joint and several decree against all the defendants having been passed, it is not open to the plaintiff to proceed in appeal against some of the defendants after leaving out the others so as to enhance the amount of mesne profits decreed by the Court below. This contention is supported by authority. In *Kamala Prasad v. Kishori Mohan* (1), the facts appear to be similar. There also a decree had been passed for possession and mesne profits against several defendants and after the passing of the decree as regards mesne profits some of the defendants had died and the appeal had been filed against the dead defendants as well as the surviving defendants, and on an application for substitution of the heir of the dead defendants it was found that they had died more than ninety days before the application for substitution was made, and therefore the application for substitution was disallowed.

In these circumstances it was held that the appeal could not proceed against the remaining respondents. Mukerji, J., observed that although in actions for mesne profits it is open to the plaintiff to proceed against one or some or all of several co-trespassers yet when he has made his choice and brought the suit against all and obtained a decree, then it is the decree in its entirety that may be challenged by him on appeal, and it is not open to the plaintiff to proceed against some of the defendants, leaving out others against whom the decree had become final. Several reasons have been given in this judgment for this view, and one of those reasons was that a procedure like this would affect the right of the surviving defendants as regards their claim for contribution against the other wrong doers. In an earlier decision of the Calcutta High Court reported in *Suttya Nundo Ghosal v. Saroop Chunder Doss* (2), it was held that the plaintiff was not at liberty, if he had recovered a

(1) *A. I. R. 1928 Cal. 180=55 Cal. 666=106 I. C. 300.*

(2) [1970] 14 W. R. 76.

decree against several persons as joint wrong doers, to single out one or more of these persons as defendants in a suit for wasilat, but must bring a suit against the parties who kept him out of possession, and there also one of the reasons given was that such a procedure would affect the right of the surviving defendants as regards their claim for contribution.

It is no doubt true that in a case of damages a suit can be brought against all or some of the wrong doers and such a suit cannot be defeated on the ground that all the wrong doers were not impleaded as defendants. But the present case was not a pure case of damages against wrong doers but it was a case for possession and mesne profits. It is conceded by the learned advocate for the appellant that the suit as a suit for possession could not have been maintained as against some of the defendants and that all the defendants were necessary parties in the suit. In any event a decree having been obtained awarding mesne profits against all the defendants the authorities referred to above are clear upon the point that the other defendants could not be left out, and the result of leaving out those defendants is that the appeal becomes untenable and cannot proceed against the remaining respondents. The preliminary objection taken by the respondents is supported by authority from which I am not prepared to differ. In this view of the case the appeal must be dismissed with costs.

James, J.—I agree.

P.N./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 329

KULWANT SAHAY AND JAMES, JJ.

Md. Abdul Matin and others — Appellants.

v.

Mt. Bibi Hamidan—Respondent.

Misc. Judicial Case No. 35 of 1932, Decided on 19th February 1932.

Civil P. C. (1908), S. 47 — Parties and representatives—Question between legal representatives of one party is not under S. 47.

Question in dispute between two persons who claim to be the legal representatives of a person who was a party to the suit does not attract the provisions of S. 47 as the dispute is not between parties who are opposed to each other in the suit and hence no appeal lies. [P 329 C 2]

A. H. Fakhruddin—for Appellants.

Anand Prasad—for Respondent.

Order.—This matter comes before us on an application under S. 5, Lim. Act,

for extension of time for filing the appeal. Notice of this application was issued and the opposite party is now represented by Mr. Anand Prasad who contends that the appeal itself is not maintainable as no appeal lies against the order complained against to this Court.

It appears that a decree for costs was passed in favour of one Munshi Umaid Ali. He died after the decree. One of his heirs applied for execution of the decree in so far as her share in the inheritance of Munshi Umaid Ali is concerned. The other heirs came forward and objected on the ground that the share claimed by the petitioner for execution is not what she claims, but less. The learned Subordinate Judge went into evidence and decided the shares of the different heirs of Munshi Umaid Ali. Against this order of the Subordinate Judge the present appellant went in appeal before the District Judge. A preliminary objection was taken before the District Judge to the effect that as the value of the suit was more than five thousand rupees an appeal would lie to the High Court and not before him. This preliminary objection prevailed, and the learned District Judge returned the memorandum of appeal for presentation to this Court. When the memorandum of appeal was presented to this Court, the Stamp Reporter reported that the appeal was barred by limitation, thereupon the appellant made the application for extension of time under S. 5, Lim. Act, which is now before us.

The preliminary objection taken by the opposite party appear to be sound and it ought to prevail. Under S. 47, Civil P.C. a question can be decided by the Court executing the decree only when it arises between the parties to the suit, or their representatives. Here the question in dispute does not arise between the parties to the suit, but between two persons who claim to be the legal representatives of a person who was a party to the suit. In order to attract the provisions of S. 47, it is necessary that the dispute must be between parties who are opposed to each other in the suit. The present appellants and the respondent cannot be considered to be in that situation. It is therefore clear that no appeal lies against the order of the learned Subordinate Judge. If the legal representatives of the deceased decree-holder are disputing as regards

the shares to which they are entitled in the inheritance of the deceased decree-holder, they ought to settle the point in a regular suit; and they cannot do so by way of application for execution of the decree. This appeal must be dismissed on the preliminary ground that the appeal does not lie, with costs to the opposite party. Hearing fee two gold mohurs.

M.N.

Appeal dismissed.

A. I. R. 1932 Patna 330 Special Bench

COURTNEY-TERRELL, C. J., FAZL ALI
AND AGARWALLA, JJ.

Kalap Chaudhuri and others—Appellants.

v.

Sitab Chand and others—Respondents.

Letters Patent Appeal No. 43 of 1931, Decided on 18th August 1932, against decision of Wort, J., in Second Appeal No. 1263 of 1929.

(a) Landlord and Tenant—(Quaere)—Transferee if tenant.

Quaere—Whether the transferee of an entire non-transferable holding is a representative of the tenant: 42 Cal. 172 held incorrectly reported; 18 C. W. N. 971 held correctly reported; A. I. R. 1927 Cal. 156, Ref. [P 331 C 1]

(b) Landlord and Tenant—Non-transferable holding transferred—Landlord not bound to re-enter but can sue original tenant for rent and bring holding to sale—Purchaser can evict transferee—Bengal Tenancy Act (1885), Ss. 24 and 158 (b).

Ordinarily a raiyat who has transferred the whole of his holding which is not transferable by custom may be held to have abandoned it and to have forfeited his tenancy. But the landlord is not bound to re-enter and may well have recourse to the alternative remedy open to him of suing the original tenant for the rent of the holding. [P 331 C 2]

A transferee of an un-transferable occupancy holding transferred it. The landlord brought a suit for rent against original tenant and sold it in execution. The purchaser brought a suit for possession against transferee within 12 years of his auction-purchase.

Held: that the previous decree for rent was valid and the auction sale passed the holding to the purchaser who was entitled to eject the transferee. [P 332 C 1]

(c) Landlord and Tenant—Non-transferable holding cannot be transferred so as to avoid paying rent—Bengal Tenancy Act (1885), S. 24.

Although an occupancy tenant can surrender the holding with the consent of the landlord, he cannot force the landlord to re-enter upon the land and escape his obligation to pay rent merely by transferring the land to a third party. [P 332 C 1]

Sunder Lal—for Appellants.

L. N. Singh and K. N. Varma—for Respondents.

Fazl Ali, J.—This is an appeal under the Letters Patent from the judgment and decree of Wort, J., reversing the judgment and decree of the Subordinate Judge of Shahabad. The facts of the case may be shortly stated thus: One Bishwanath had a non-transferable occupancy holding of 3.85 acres which he transferred on 31st January 1907 to one Rajnath. Subsequently Rajnath transferred portions of the holding to various persons including the ancestors of the defendants. In this appeal we are concerned only with the land which was transferred to the ancestors of the defendants and which is about 18 cattas in area. It appears that on 1st November 1917 one Har Prasad Das the predecessor-in-interest of the plaintiff who was admittedly the 16 annas landlord of the village obtained a rent decree against Bishwanath the original tenant, and in execution of the decree, the holding was sold on 11th April 1918. On 8th October 1918 Har Prasad obtained dakhaldhani. On 8th May 1923 the plaintiff having succeeded to the interest of Har Prasad brought the suit out of which the present appeal arises, for the ejectment of the defendants. The suit was decreed by the Court of first instance but dismissed on appeal by the Subordinate Judge. The learned Subordinate Judge held that the entire holding having been transferred in the year 1907, it must be assumed that it had been abandoned by the tenant and that being so, the relationship of landlord and tenant had ceased to exist as between Har Prasad and Bishwanath and the decree obtained by the plaintiff against the original tenant was a nullity and therefore not binding upon the defendants. The learned Subordinate Judge further held that the defendants having been in adverse possession of the disputed land for more than 12 years had acquired a good title to the land which was not affected by the decree obtained by the landlord against the original tenant. On these findings the learned Subordinate Judge reversed the decision of the Munsif and dismissed the plaintiff's suit.

On appeal to this Court a question was raised as to whether the defendants were the representatives of the original tenant or not and relying upon the decision of

this Court in *Bhikhia Jha v. Brij Behari Singh* (1), Wort, J., held that they were his representatives. The reason why this question was raised was that if the defendants were the representatives of the original tenant, they would be bound by the decree in the rent suit and by the subsequent delivery of possession and holding that they were the representatives of the original tenant and therefore bound by the execution proceedings, Wort J., held that the plaintiff's action was not barred by limitation. He accordingly reversed the decision of the Subordinate Judge and decreed the suit of the plaintiff. Mr. Sundar Lal who appears for the appellant has devoted his argument largely to the question as to whether the defendants should be regarded as the representatives of the original tenant or not and he has pointed out that the view which has been expressed both in this Court and in the Calcutta High Court that the transferee of an entire non-transferable holding is a representative of the original tenant was based upon an erroneous reading of the well known case of *Dayamayi v. Ananda Mohan Roy* (2). There is no doubt that Mr. Sundar Lal has succeeded in showing that the report of the case as it appears in [*Dayamayi v. Ananda Mohan Roy*] 42 Calcutta is not quite accurate and that the report of the case which is to be found in 18 C. W. N. 971 is more correct. Referring to this report it is clear that the question that was referred to the Full Bench was not whether the transferee of an entire non-transferable holding was the representative of the tenant, but whether a transferee of a part of such holding was his representative. This has been pointed out clearly in *Purna Chandra Kundu v. Manobini Devi* (3). It appears to me therefore that the cases which were decided on the assumption that it has been held in *Dayamayi's* case (2) that the transferee of an entire non-transferable holding is a representative of the tenant require re-consideration; but at the same time I do not think it necessary to decide that question in this appeal as the appeal is capable of being

disposed of on a different point altogether. It may be assumed that ordinarily a raiyat who has transferred the whole of his holding which is not transferable by custom may be held to have abandoned it and to have forfeited his tenancy.

The fact however remains that the landlord is not bound to re-enter and may well have recourse to the alternative remedy open to him, that is to say, he may still sue the original tenant for the rent of the holding. This is so, because a tenant cannot escape his obligation to pay rent by merely transferring his holding to another person without the consent of the landlord. In the present case a rent suit was brought in the year 1917 against the original tenant and a decree was obtained against him. The learned Subordinate Judge is of opinion that the decree was a nullity merely because the holding had been abandoned; but I am not prepared to agree with him on this point. If the tenant was still under an obligation to pay the rent, the decree obtained by the landlord cannot be regarded as a nullity. On 11th April 1918 the lands which constituted the holding were sold in execution of the rent decree and as a result of the sale not only the right, title and interest of the judgment-debtor but the entire holding passed to the purchaser. Now if a person other than the landlord had purchased the holding at the sale, he would have acquired a good title to the entire holding and the defendants could not have defeated that title unless they proved that they had been in possession of the lands adversely to him for a period of 12 years or more from the date of the auction sale. The same principle will in my opinion apply where the landlord is himself the purchaser of the holding and his title cannot be defeated unless the defendants prove adverse possession for 12 years since the date of the auction purchase, which was in this case in the year 1918. In the present case the suit was brought in the year 1923, that is to say, within 12 years of the date of the auction sale and there cannot be any question of the defendants being in adverse possession for more than 12 years since the date of that sale.

Mr. Sundar Lal however contends that it should have been proved in this case by the plaintiff that one of the terms of Bishwanath's tenancy was that the tenant

(1) [1917] 2 Pat. L. J. 478=42 I. C. 526.

(2) [1915] 42 Cal. 172=18 C W.N.971=27 I.C. 61 (F.B.).

(3) A. I. R. 1927 Cal. 156=53 Cal. 913=99 I. C. 718.

could not abandon the holding at any time he liked and that he would be held liable for rent even after abandoning the holding. In my opinion however it was unnecessary for the plaintiff to show this, because Bishwanath was admittedly an occupancy tenant and the incidents of an occupancy tenancy are well known. In my opinion although he could surrender the holding with the consent of the landlord, he could not force the landlord to re-enter upon the land and escape his obligation to pay rent merely by transferring the land to a third party. It is then urged by Mr. Sundar Lal that the decree obtained by the plaintiff in the year 1917 should be treated not as a rent decree but as a money decree only. Here also I am unable to agree with him because as I have already stated the tenant had no right of his own will and independently of the consent of the landlord to divest himself of his liability as a tenant to pay the rent and the landlord's claim for rent was a valid one. In these circumstances the decree passed by Wort, J., seems to be correct and in my opinion this appeal should be dismissed with costs.

Courtney-Terrell, C. J.—I agree.

Agarwalla, J.—I agree.

M.N./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 332

KULWANT SAHAY AND ROWLAND, JJ.

Sripat Singh and others—Appellants.

v.

Naresh Chandra Bose and others—Respondents.

First Appeal No. 94 of 1921, Decided on 3rd May 1932.

(a) **Civil P. C. (1908), O. 13, R. 2** — Late production of documents and change in pleadings should be discouraged — Payment alleged at stage of making mortgage decree final—No prima facie case—Additional evidence and change of pleadings were disallowed — Practice, Pleadings — Civil P. C. (1908), O. 6, R. 7.

Court should be careful in allowing parties to make out at a late stage a new case different from that which was set up in their pleadings before the trial, and should not be too ready to receive in evidence documents produced very late with the allegation of their having been mislaid. [P 333 C 1, 2]

Where a receipt was sought to be filed at the stage of the passing of a final mortgage decree to prove partial satisfaction of the debt and no prima facie case was made out in support of the payment alleged; the Court would not be justified in permitting the defendant to reopen his pleadings and put the plaintiff to the expense

and harassment of a fresh contest on evidence on the question of this payment. [P 334 C 1]

(b) **Evidence Act (1872), S. 92, Ill. (i)**—Receipt accompanied by demand of payment is common.

In India the practice of applying for payment of a debt by sending a receipt for the money is by no means unknown and is in fact referred to in Ill. (i), S. 92. [P 333 C 2]

(c) **Civil P. C. (1908), O. 34, R. 11**—Bond rate interest till expiry of grace period cannot be claimed as of right.

Though it is quite correct to allow interest at the bond rate up to the expiry of the period of grace there is nothing in the Code compelling the Court to do so. [P 334 C 1]

(d) **Transfer of Property Act (1882), S. 75**—Heir of assignee of prior mortgagee and mortgagor same—Heirs can claim priority—**Transfer of Property Act (1882), S. 101.**

Legal representative of an assignee of a prior mortgagee who had obtained a decree, who also happens to be the legal representative of the mortgagor, can claim priority. [P 334 C 2]

Sultan Ahmad and Harihar Prasad Sinha—for Appellants.

S. N. Bose and S. Mustafi—for Respondents.

Rowland, J.—This appeal arises out of a suit to recover money secured on a mortgage of immovable property executed in favour of the father of the plaintiff in 1895. The properties are also subject to other mortgages and the priority of the mortgagees and their assignees was the subject matter of contention at the original hearing of the suit and of the appeal from the preliminary decree which was heard in this Court in 1925.

The questions of priority were decided in this Court's order dated 27th May 1925,* which varied the decree of the Court below and directed that accounts be taken of the dues of the several mortgagees and a decree be prepared for which directions were given in conformity with the provisions of O. 34, Civil P. C. The record was remitted to the Subordinate Judge for the taking of accounts and is now before us for our direction as to the preparation of the final decree. Objection to the statement of account prepared by the Subordinate Judge has been taken on behalf of the contesting defendants 2 to 4, and objection has also been taken on behalf of the plaintiff. On behalf of defendants 2 to 4 (of whom defendant 4 Jamahir Kumari died on 11th October 1925, and is represented by defendant 2) the only objection pressed is that the Subordinate Judge should have given credit for a payment

* *Sripat Singh v. Naresh Chandra*, A. I. R. 1926 Pat. 94.

of Rs. 3,971-4-9 said to have been made to the father of the plaintiff on 20th May 1897, and supported by a receipt. Having regard to the interest payable, this credit, if allowed, would affect the amount of the decree to the extent of a very much greater sum. No such payment was pleaded in the written statement in the Original Suit No. 268 of 1919. The objector's case is that the receipt was discovered in April 1929, among the papers relating to the property which had been released from management by the Official Receiver in August 1927. The objector followed up the filing of this receipt with petitions for orders of the Court to call for production of the plaintiff's books of account of 1897 and of the books of account of the Official Receiver. On 9th March 1931, the objector also filed with a petition two original letters dated 16th and 18th May 1897, and on account sheet dated 20th May 1897, and prayed that they might be taken in evidence along with the receipt previously filed.

The plaintiff objected to the reopening of the question of the amount due under his mortgage bond at this late stage. The Subordinate Judge on 6th May 1930, directed the issue of a commission for the examination in Calcutta of the Official Receiver or a member of his staff in connexion with the accounts. This commission was issued, but the pleader commissioner reported on 10th September 1930, that on the date fixed for executing the commission he found the plaintiff present and ready but no one was there on behalf of the objector. So he returned the commission without examining the witnesses. In January 1931, it appears to have been realised by defendant 2 Sripat Singh, that the payment alleged was outside the scope of his pleadings in the suit. He presented on 27th January 1931, a supplementary written statement. The Subordinate Judge placed it on the record without then passing a definite order accepting or rejecting it. Eventually he refused to take in evidence the receipt for Rs. 3,971-4-9 and passed order on 10th March 1931 rejecting the additional written statement. The contention of the objector is that the supplementary written statement ought to have been accepted and that the receipt ought to have been taken in evidence and the payment supported by it ought to have been credited. Now it is a well-known principle that

Courts should be careful in allowing parties to make out at a late stage a new case different from that which was set up in their pleadings before the trial, and should not be too ready to receive in evidence documents produced very late with the allegation of their having been mislaid; and the respondent meets the contention of the objector by referring to the pleadings in the original suit.

There was a statement of account given in the plaint showing that interest on the original loan of Rs. 17,000 calculated up to January 1928 amounted to Rs. 5,420, against which payment of Rs. 4,500 is credited as made in January 1898, succeeding payments credited in the account bringing the total of payments credited in the plaint to Rs. 6,600. In the written statement of defendants 2 and 3 (para. 6) it is alleged that Rs. 6,700 has already been paid on account of interest. Thus the plaintiff and these defendants were at that time at variance only to the extent of Rs. 100 with regard to the question how much had been paid on account of interest. If a payment of Rs. 8,971-4-9 had been made in May 1897 there would not be Rs. 4,500 due on account of interest in January 1898, and it was, until 1929, the case of both parties that that payment had been made on account of interest. If there had been a payment in May 1827, as now suggested, it must have appeared in the books of the plaintiff as well as those of the Official Receiver, both of which were produced at the original hearing before the passing of the preliminary decree. It is suggested for the plaintiff that Hari Charan Bose may have sent in his account accompanied by a stamped receipt in anticipation of payment, which payment was not in fact made. In India the practice of applying for payment of a debt by sending a receipt for the money is by no means unknown and is in fact referred to in Ill. (i), S. 92, Evidence Act.

There is an indication that this was the case here in the fact that Hari Charan Bose submitted his account bearing date 20th May 1897, and that the receipt bears the same date. Had the receiver made a payment after receiving the account and had the receipt been given after taking the payment, it was more likely that the receipt should be dated one or two days later than the account. That being so, the conduct of the objector, as disclosed in the commissioner's

report dated 10th September 1930, seems very significant. When it came to the examination of witnesses on commission in the office of Official Receiver on the question of the actual payment, he and his men failed to turn up. I would dispose of this objection by saying that no *prima facie* case is made out in support of the payment alleged; and we should not be justified in permitting the defendant to 'reopen his pleadings' and put the plaintiff to the expense and harassment of a fresh contest on evidence on the question of this payment. The objection of defendant 2 therefore fails.

It remains to consider the objections of the plaintiff. First it is said that the Subordinate Judge's calculation of account is erroneous in that interest at bond rate has been calculated only up to six months after the date of this Court's order of 25th May 1925. Interest at the bond rate, it is stated should have been calculated up to the expiry of the period of grace. We have been referred to O. 34, Rr. 2 and 4, Civil P. C. and to cases of mortgage suits in which interest at bond rate was allowed up to the expiry of the period of grace. But though it has been held to be quite correct to allow interest at the bond rate up to the expiry of the period of grace there is nothing in the Code compelling the Court to do so, and in the case of *Raghunath Prasad v. Sarju Prasad* (1) interest at bond rate was allowed only up to date of the decree of the first Court. Indeed O. 34, R. 2, as I understand it, contemplates a declaration of the amount due at the date of the decree, this declaration to be made (a) at the time of the judgment itself, or (b) after taking an account. The statutory authority for allowing interest at bond rate beyond the date of the preliminary decree appears to be in O. 34, R. 11, and here the provision is "the Court may order payment of interest." In this appeal, the date up to which interest at bond rate was to be calculated is fixed in the order of this Court of 25th May 1925 as being six months from date of that order. It was not open to the Subordinate Judge and it is not open to us to fix another date. The second objection is that as defendant 2 has succeeded to the interest of Jamahir Kumari, the prior lien declared by the Court in favour of

Jamahir Kumari over the Calcutta property has become extinct.

A mortgagor cannot, it is said, by paying off a prior mortgage hold it up as a screen against a subsequent mortgagee. This however is not a case in which a mortgagor has paid off the amount of a prior mortgage. The mortgagor is dead. Jamahir was held to have purchased the assignment of the prior mortgage in her own right and not as a farzidar for the original mortgagor, and her rights had passed beyond the domain of contract to that of decree when this Court passed its order on 27th May 1925. On her death thereafter the rights assured to her by this Court's order could not be denied to her legal representatives. The result is that the objections of the plaintiff to the account prepared are disallowed and the account is confirmed. A final decree will be prepared declaring the amounts due under the several mortgages on 25th November 1925, as ascertained by the Subordinate Judge and allowing simple interest at 6 per cent on these amounts till realization. The date of grace we fix at six months from this date.

A word is necessary as to the unfortunate delay in the disposal of these proceedings. The suit was instituted in 1919 and preliminary decree was passed by the Subordinate Judge on 8th October 1920. The appeal from that decision presented on 25th April 1921 was heard in April 1925 and the subsequent proceedings before the Subordinate Judge lasted till 31st March 1931. A good deal of the delay appears to be due to the residence of some of the parties in Calcutta and to contested applications for issue of commissions for examination of witnesses. But in spite of the obvious difficulties in disposing of the matter promptly the delay in the Court of the Subordinate Judge was clearly excessive.

Kulwant Sahay, J.—I agree.

M.N./R.K. *Objections disallowed.*

A. I. R. 1932 Patna 334

MACPHERSON AND JAMES, JJ.

Tarini Mahton—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 204 of 1932, Decided on 31st August 1932, against decision of Addl. Sess. Judge, Bhagalpur, D/- 29th June 1932.

(1) A. I. R. 1924 P. C. 60=51 I. A. 101=3 Pat. 279=32 I. C. 817 (P.C.).

Whipping Act (4 of 1909), Ss. 3, 4 and 5—S. 5 does not supersede S. 4 but is applicable alternatively with Ss. 3 and 4.

Section 5 does not supersede S. 4. S. 5 is meant to be applied in proper cases alternatively with Ss. 3 and 4 which apply to juvenile offenders as well as to offenders who are not within the definition of juvenile offenders. [P 335 C 1]

Judgment.—The appellant has been convicted under S. 376, I. P. C., of rape upon a girl of about seven years of age in circumstances involving injury to the girl and has been sentenced to four years' rigorous imprisonment and a whipping of 15 stripes. The appeal is preferred from jail. The appeal has been admitted to consider the applicability of S. 5, Whipping Act. That section sets out that any juvenile offender (an expression which is defined to mean an offender whom the Court shall find to be under 16 years of age) may, when convicted of committing certain offences of which rape is one, be punished with whipping in lieu of any other punishment to which he may for such offence be liable.

In the first place, S. 5 does not supersede S. 4 under which the punishment awarded in this case is legal. S. 5 is meant to be applied in proper cases alternatively with Ss. 3 and 4 which apply to juvenile offenders as well as to offenders who are not within the definition of juvenile offenders. Again the learned Sessions Judge, though pointing out that the medical evidence which is that the appellant is 16 or 17 years of age, "does not definitely show that he is not under 16 years of age," has nowhere come to the finding which is essential to bring the case under S. 5, that the appellant is actually under 16 years of age. And indeed there is no evidence upon which he could come to such a finding. There is thus no mistake in law in the sentence appealed against. Further the conviction is correct and the sentence is, in the circumstances of the case, proper. We accordingly dismiss the appeal.

M.N./R.K.

Appeal dismissed.

A. I. R. 1932 Patna 335

MACPHERSON, J.

Batisa Singh and others—Petitioners.
v.

Emperor—Opposite Party.

Criminal Revn. No. 368 of 1932, Decided on 2nd September 1932, against order of Sess. Judge, Shahabad, D/- 22nd June 1932.

(a) **Penal Code (1860), Ss. 71, 147 and 347—Separate convictions for Ss. 147 and 347 are legal—Aggregate sentences should not exceed that for graver offence—Criminal Trial, Sentence.**

Separate convictions under Ss. 147 and 347 are perfectly legal although the aggregate sentences cannot be in excess of the sentence which can be passed for the offence which is the more heavily punishable under the Code. [P 336 C 1]

(b) **Criminal P. C. (1898), S. 439—Scope.**

The facts are not ordinarily open in revision. [P 336 C 1]

(c) **Penal Code (1860), Ss. 30 and 347—Paper with thumb impression delivered—Understanding is to convert it into valuable security—Evidence Act (1872), S. 114.**

Where a person places his thumb impression on a blank paper, the understanding between him and the person to whom he delivers the paper ordinarily is that it is to be converted into a valuable security : 38 *All. 430, Rel. on.*

[P 336 C 2]

(d) **Penal Code (1860), Ss. 30 and 347—Person by fear of injury induced to place thumb mark on blank paper—Such paper is valuable security and conviction under S. 347 is legal.**

Where accused intentionally put a person in fear of injury to himself and thereby dishonestly induced him to place his thumb impression upon certain pieces of paper, being in each case something signed which could be converted into a valuable security under S. 30, the document extorted being valuable securities, conviction under S. 347 is correct. [P 336 C 1]

S. Sinha and Gopal Prasad—for Petitioners.

S. Jaffar Imam and J. N. Sahai—for the Crown.

Judgment.—This application in revision relates to the conviction of the petitioners under Ss. 147 and 347, I. P. C., and their sentences, under the former section of two months' rigorous imprisonment and under the latter of six months' rigorous imprisonment and a fine of Rs. 50, the sentences of imprisonment to run concurrently. The facts established are that after nightfall when the complainant Ramphal Singh, an old man of 77, had gone outside his hamlet for purposes of nature and was returning home by the village lane which passes by the dhaba or veranda of Pancham Singh, the first five petitioners seized him and lifted him bodily on to the veranda, laid him down on the straw-strewn floor, Radha gagged him, Kapildeo said to the petitioner Bar-meshwar "Light a lantern and take his thumb impression" and Keshari took his thumb impressions on no fewer than six pieces of papers and then they let him go. The common object set out in the charge under S. 147 was :

"to wrongly confine Ramphal Singh, for the purpose of extorting thumb impression from him."

and the charge under S. 347 was of wrongly confining him :

"for the purpose of extorting from him certain property, to wit, thumb impressions on certain blank pieces of papers which can be used as valuable securities."

Mr. S. Sinha in support of the rule urges : (1) that convictions under both the charges cannot be legal ; (2) that Ramphal Singh being very short-sighted, the petitioners have not been adequately identified ; (3) that the conviction under S. 347 is not sustainable on the facts in view of the definition of "valuable security"; and (4) that the sentence is severe, the offences being merely technical. As to the first point, it is indisputable that separate convictions under Ss. 147 and 347 are perfectly legal. It may indeed well be that the aggregate sentences which could be passed, cannot be in excess of the sentence which can be passed for the offence which is the more heavily punishable under the Code, but that point manifestly does not arise in the case of the petitioners. As to the second point, the facts are not ordinarily open in revision ; but, in any case, as the five petitioners had actually caught hold of Ramphal so that they were well within his range of vision and Barmeshwar lit a lamp, there is ample evidence of identification of the petitioners apart from the corroboration afforded by the testimony of the other prosecution witnesses. This plea is unfounded. The third point also cannot prevail. It is conceded that even if S. 347 does not apply, S. 342 is certainly applicable. Further, it might be argued that the word "extorting" is not employed in Ss. 347 and 348 in the same sense as "extortion" as defined in S. 383. But in any case, it has been found as a fact that the petitioners intentionally put Ramphal Singh in fear of injury to himself and thereby dishonestly induced him to place his thumb impression upon certain pieces of paper, being in each case something signed which could be converted into a valuable security under S. 30, I. P. C., that is to say, into :

"a document which is, or purports to be one whereby a legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right."

Now, in this province where a person places his thumb impression on a blank paper, the understanding between him and the person to whom he delivers the paper, ordinarily is that it is to be converted into a valuable security. A difference hardly ever arises between the parties on that point. The difference is nearly always as to the nature of the document which it was intended should be executed. As was indicated in *Jawahir Thakur v. Emperor* (1) in regard to a document under S. 474, the affixing of a thumb impression to a paper is :

"authority to the holder of the same to make the document into a valuable security."

The thumb impression is everywhere regarded as the signature of an illiterate man. In my opinion, the documents which were extorted from Ramphal Singh were "valuable securities" and the ingredients of S. 347 were present in the circumstances which have been found. Accordingly the conviction under S. 347 is correct. The sentence which is in the aggregate only six months' rigorous imprisonment and a fine of Rs. 50, is in my opinion, by no means severe. The sentence under S. 347 would have been lenient even if the further offence of rioting had not been established. It is far from the reality to speak of the action of the petitioners as technical infringements of the law, and indeed so rife has the offence become in this province that in all such cases a deterrent sentence is indicated. Furthermore the sentence would not have been excessive even if the third point had succeeded and the conviction under S. 347 had to be altered to one under S. 342. The application is without merit and the rule is discharged. If Batisa Singh and Radha Singh are on bail, they should be directed to surrender forthwith to undergo the unexpired portions of their sentences.

M.N.

Rule discharged.

(1) [1916] 38 All. 430=17 Cr. L. J. 203=34 I. C. 375.

A. I. R. 1932 Patna 337

JAMES AND AGARWALA, JJ.

(Thakur) Bageshwari Charan Singh—
Plaintiff—Appellant.

v.

Bindeshwari Charan Singh and others—
Defendants—Respondents.First Appeal No. 159 of 1928, Decided
on 29th July 1932, against decision of
Sub-Judge, Hazaribagh, D/- 31st March
1928.(a) Limitation Act (1908), S. 21—Applica-
tion for sanction of grant amounts to ad-
mission of grantor's title and is acknow-
ledgment of title under S. 21 and binds
minor.

The defendant, who was a minor, was in pos-
session of certain immovable property under a
Khorposh grant made to him in 1909 by his
father whose estate, though released by the
Court of Wards, continued to be subject to the
provisions of S. 12-A, Chota Nagpur Encum-
bered Estates Act. The sanction of the Com-
missioner was not obtained in respect of the
grant. In 1916 the defendant's mother, who
was his guardian appointed under the Guardians
and Wards Act, applied to the Commissioner
during his minority to sanction the grant of
1909 or order a fresh grant on the same terms to
be executed. In a suit by the plaintiff within
12 years of this application for possession of the
property covered by the khorposh grant, the
defendant pleaded adverse possession for over
12 years from 1909.

Held: that the application of 1916 which in
effect amounted to an admission that the minor
had no title to the property until the grant was
sanctioned and that the title still remained with
the grantor, was an acknowledgment of the
grantor's title within the meaning of S. 21 and
was binding on the minor and prevented the
operation of the Statute of Limitation: *A. I. R.*
1932 P.C. 55, *Ref.* [P 339 C 1]

(b) Chota Nagpur Encumbered Estates Act
(1896), S. 12-A—Khorposh grant—Sanction
of Commissioner is necessary.

A khorposh grant attracts the operation of
S. 12-A and requires for its validity the previous
sanction of the Commissioner. The object of
the Act is to preserve the estate for the heir, and
any dealings with the property which might
have the result of keeping the heir out of posses-
sion attracts the operation of S. 12 A. A khor-
posh grant usually implies that the subject-
matter of the grant will revert to the grantor or
his heir only on failure of descendants of the
grantee in the direct line. Hence a khorposh
grant made by a person, whose estate is subject
to the provisions of S. 12-A is not valid unless
sanctioned by the Commissioner. *Case law*
referred. [P 339 C 2, P 340 C 1, 2]

(c) Civil P. C. (1908), S. 11—Law forbid-
ing doing of certain thing—Failure of defen-
dant to plead in previous suit positive bar
does not prevent him in raising it in subse-
quent suit.

In a proper case a decision on a question of
law attracts the operation of the doctrine of
res judicata as effectively as a decision on a
question of fact. Where however, the law for-

bids a certain thing being done in a suit no
amount of failure by the defendant in the pre-
vious suit to plead the positive bar created by
the legislature will prevent its being taken up
in a subsequent suit. [P 341 C 1, 2]

In a previous suit between the parties the
validity of a khorposh grant made by the
grantor, whose estate was subject to the provi-
sions of S. 12-A, Chota Nagpur Encumbered
Estates Act, to the grantee without the sanction
of the Commissioner was in issue and it was
decided in that suit that the grant was valid.

Held: that the decision as to the validity of
the grant which was a pure question of law did
not operate as res judicata in a subsequent suit
between the parties in which the validity of the
grant was in question: *A. I. R.* 1931 Pat. 364
and *A. I. R.* 1928 Pat. 227, *Ref.* [P 342 C 1]

Shiveshwar Dayal and S. S. Bose—
for Appellant.

S. M. Mullick, B. C. De, Janak K.
shore and Bindeshwari Prasad—for Res-
pondents.

Agarwala, J.—The appellant, who
was the plaintiff in the Court below, is
the present holder of the Darguli estate
in Chota Nagpur and is a grandson of
Thakur Jadu Charan Singh, the previous
holder of the estate. Jadu Charan had
two sons by his first wife, namely, Ram-
dhan Charan Singh and Jibdhan Charan
Singh; by his second wife, Thakurain
Jagarnath Koeri, he had a third son,
Bindeshwari Charan Singh. The plain-
tiff Bageshwari Charan Singh is the
son of Ramdhan Charan. In 1890 Jadu
Charan gifted several villages to his
second wife for the maintenance of her-
self and any children she might bear
him. The income of these villages was
stated to be about Rs. 800 per annum.
In 1894 the management of the estate
was taken over under the provisions of
the Chota Nagpur Encumbered Estates
Act of 1876. It was released to Jadu
Charan on 15th May 1909. S. 12-A of
the Act, however continued to apply to
the estate. On 16th June 1909, Jadu
Charan executed another deed of gift of
certain villages in favour of his second
wife and on 17th November of the same
year he made a khorposh grant in favour
of his youngest son Bindeshwari of villa-
ges and lands whose annual value was
stated to be Rs. 1,300. These lands are
described in Sch. A to the plaint of the
present suit. The sanction of the Com-
missioner under S. 12-A was not obtained
either in respect of the gift or the grant
but seven years later, on 14th March
1916, Jadu Charan applied to the Com-
missioner to sanction them. At the same

time two petitions for sanction were filed by the Thakurain one on behalf of herself in respect of the gift to her of 16th June 1909, and the other as guardian of Bindeshwari and in respect of the grant to him of 17th November 1909. The Commissioner refused his sanction.

Bindeshwari attained his majority on 21st September 1917 and on 2nd November 1917 he instituted Suit No. 117 of 1917 against Jadu Charan, his father, and Jibdhan and Ramdhan Charan, his brothers. This was a suit for maintenance. Ramdhan filed a written statement in that suit, but took no further steps in it. On 12th November 1919 a decree was passed in that suit, under which Bindeshwari was to get a khorposh of properties yielding an income of Rs. 2,300 in cash and Rs. 400 in produce in addition to the lands covered by the grant of 1909. An application under O. 9, R. 13, Civil P. C. was made by Ramdhan but was dismissed on 3rd January 1920. Then on 21st January Jadu Charan, purporting to act in obedience to the decree, executed a khorposh grant in favour of Bindeshwari Charan in respect of certain properties yielding an income of Rs. 2,700 and including the right to the minerals. These properties are described in Sch. B to the plaint. In addition to these Sch. B properties the grant also purported to convey the Sch. A properties which were covered by the deed of 1909. Ramdhan died on 30th January 1920. The management of the estate was again taken over under the Chota Nagpur Encumbered Estates Act in 1921. On 21st February 1924 Jadu Charan died intestate. The plaintiff Bageshwari, son of Ramdhan, succeeded under the rule of lineal primogeniture. Some of the properties included in the grant of 1920 were subsequently usufructuarily mortgaged to defendant 2.

Bageshwari instituted the present suit on 14th May 1926 in the Court of the Subordinate Judge of Hazaribagh, through the Manager of the Darguli Encumbered Estate, against Bindeshwari Charan and the usufructuary mortgagee. He prayed for a declaration that the grants of 1909 and 1920 were invalid and inoperative, for recovery of possession of Sch. A and B properties and for recovery of Rupees 9,500 as mesne profits for 1981 and 1982 Sambat and Rs. 200 as damages for timber and wood removed during those

years. He alleged that the decree in Suit No. 117 of 1917 was collusive; that that suit had abated for nonsubstitution of parties on the death of Ramdhan; and that under a custom prevailing in the estate the proprietor could make khorposh grants only of property yielding an income of Rs. 100 per annum and khas jote land up to 12 bighas. He also contended that the grants were invalid for want of the Commissioner's sanction under S. 12-A. Defendant 1, on the other hand, pleaded inter alia that the decree in the 1917 suit operated as res judicata with the result that the plaintiff could not now be heard to say that the holder's right to make khorposh grants was limited by custom, or that the grant of 1909 was invalid, or that he (the defendant) was entitled to less than a khorposh grant yielding Rs. 4,000 a year. His contention was that a decision on all these points is either expressed or implicit in the decision of the suit of 1917. The defendant also pleaded limitation with respect to the Sch. A lands, claiming to be in adverse possession of them since 1909. It is not disputed that he has been in possession since then.

The Subordinate Judge dismissed the suit. He found that the custom averred by the plaintiff was not proved; that the decree in the suit of 1917 was not void on account of collusion and that the decree in that suit was a final and not a preliminary decree and therefore that the suit had not abated for nonsubstitution of the present plaintiff in place of his father. He also found that the grant of 1909 was void by reason of the want of the Commissioner's sanction under S. 12-A of the Act, but came to the conclusion that the decision in the 1917 suit operated as res judicata on this point and therefore that the grant must be treated as valid. With regard to the grant of 1920 he held that S. 12-A was controlled by S. 23 which permits the bringing of a suit for maintenance, and that the grant being in pursuance of the decree obtained in such a suit was not rendered void by S. 12-A except as to the mineral rights which were not mentioned in the decree. Having found that the grant of 1920 was valid, and that the grant of 1909 must be treated as valid, the Subordinate Judge held that the question of adverse possession did not arise, but expressed an

opinion that if the grants were invalid recovery of the properties covered by the grant of 1909 was barred.

With regard to limitation, it is clear that if the grant of 1909 was valid, no question of adverse possession can arise; and that if that grant was invalid, the present claim to recover the land covered by the grant is time-barred, unless there has been such an acknowledgment as is contemplated by S. 19, Lim. Act. Plaintiff contends that the application for sanction made on behalf of Bindeshwari Charan on 4th March 1916 constitutes such an acknowledgment and he relies on the decision of the Privy Council in *Bageshwari Charan Singh v. Jagarnath Kuari* (1). That was a suit instituted by the present plaintiff to recover from the mother of the present defendant 1 the properties of which she was in possession under the gift of 16th June 1909, on the ground, inter alia, that the gift was void by reason of want of the Commissioner's sanction under S. 12-A. The defendant in that suit pleaded adverse possession for more than twelve years. To this defence the plaintiff replied that the application for sanction made in 1916 was an admission which constituted an acknowledgment under S. 19, Lim. Act. The High Court (Das and Adami, JJ.) negatived the contention. This decision was reversed by the Privy Council. The petitions filed by the Thakurain for sanction in 1916 on behalf of herself and on behalf of Bindeshwari were in precisely the same terms. The material words of the petitions were:

"that in view of the petition filed by Thakur Jado Charan Singh your petitioner begs to file the original deed of grant and prays that your honour may be pleased to sanction the same or order fresh grant on the same terms to be executed."

The only difference between the Privy Council case and the present one, on the question of limitation, is that in the present case the admission was made not by defendant 1 himself who was then a minor, but by his mother on his behalf. She however had been appointed his guardian on 14th November 1906, and it is therefore clear that in view of the provisions of S. 21, Lim. Act, the admission made by her binds him. Mr. Mullick for the respondent defendant submitted that the decision of the Privy

Council as to the correct construction of the petition of 1916 was not binding in the present case. As I have already said, the two petitions filed by the Thakurain were in precisely similar terms and I am therefore of opinion that we are bound by the construction placed by their Lordships of the Privy Council on the document which was before them. The matter is of no importance because I should have construed the documents in the same way myself. (After considering the evidence, his Lordship proceeded.) I shall now consider the sections of the Chota Nagpur Encumbered Estates Act relevant to the present case. As has been already subserved, the Darguli estate was subjected to the provisions of the Act in 1894. Jadu Charan was then the proprietor of the estate and it was released to him on 15th May 1909, subject to the operation of S. 12-A. The first clause of that section runs as follows:

"When the possession and enjoyment of properties is restored, under the circumstances mentioned in the first or third clause of S. 12, to the person who was the holder of such property when the application under S. 2 was made, such person shall not be competent, without the previous sanction of the Commissioner, (a) to alienate such property, or any part thereof in any way, or, (b) to create any change thereon extending beyond his own life-time."

An appeal lies to the Board of Revenue from the refusal of the Commissioner to sanction an alienation or charge. Cl. (3) provides that every alienation or charge made or attempted in contravention of sub-S. (1) shall be void.

The question that arises is whether the khorposh grant made by Jadu Charan in favour of Bindeshwari Charan (defendant 1) on 17th November 1909 was void for want of the sanction of the Commissioner under S. 12-A. The plaintiff's contention is that the grant was void ab-initio. The defence however is that a khorposh grant is not an alienation within the meaning of the section. According to the defence the sole object of the Act is to preserve the estate for the benefit of the members of the family and therefore a grant to a member of the family does not offend against the object of the statute. With this contention I am not in agreement. In my opinion the object of the statute is to preserve the estate for the heir, and any dealings with the property which might have the result of keeping the heir out of posses-

(1) A. I. R. 1932 P. C. 55=136 I. C. 798=59 I. A. 139=11 Pat. 272, (P. C.).

sion attracts the operation of S. 12-A. A khorposh grant usually implies that the subject-matter of the grant will revert to the grantor or his heir only on failure of descendants of the grantee in the direct line. In the present instance the grant of 1909 purported to be a grant

"in khorposh from 1966 Sambat to Baboo Sri Bindeshwari Charan Singh, my youngest son, descendible to children, generation after generation."

Except therefore in the event of Bindeshwari Charan dying without issue in the life-time of Jadu Charan the grantor and his heir were likely to be kept out of possession of the land covered by the grants for a very considerable period. The validity of this grant however was directly in issue in the suit of 1917, and the contention of the defendant in the present suit is that the decision of that issue now operates as *res judicata*. In that suit the trial Court said that the word "alienate" is used in S. 12-A :

"in the sense of the transfer by way of sale, gift or mortgage so as to pass the property away from the hands of the proprietor's family,"

and the Court was of opinion that this construction of the section was clear from a perusal of the Statement of Objects and Reasons prefixed to the Bill which resulted in S. 12-A being added to the original Act. The Court obviously misread the Statement of Objects and Reasons for one of the objects of the Bill was stated to be to prevent disqualified proprietors from making extravagant khorposh grants. In this appeal the defendant-respondent supports the Subordinate Judge's interpretation of S. 12-A by a reference to the third subsection of S. 3. That subsection renders the proprietor of the estate during the period of management under the Act incompetent "to mortgage, charge, lease or alienate" his immovable property. From this it was argued that the Act itself distinguishes between alienation on the one hand and a mortgage, charge or lease, on the other and therefore that the alienation prohibited by S. 12-A (1)(a) is something different from a mortgage, charge, lease or khorposh grant. Mr. Mullick's contention on behalf of the respondent was that if there be any interest in the property remaining in the grantor, there is no alienation within the meaning of the section ; and that as the grantor has an interest in the reversion to a khorposh

grant, it follows that such a grant is not an alienation. Following this line of reasoning he was prepared to go to the length of saying that an usufructuary mortgage of the whole estate would not offend the provisions of S. 12-A. If his contention were sound, the object of the section, namely, the preservation of the estate, could always be defeated by the execution of a mortgage or permanent rent-free lease of the whole estate. I have no hesitation in holding that a khorposh grant attracts the operation of the section and requires for its validity the previous sanction of the Commissioner.

It remains however to consider the effect of the decision in the 1917 suit on this question. As has been already said, that was a suit between the present plaintiff Bindeshwari Charan, on the one side, and Jadu Charan, Ramdhan Charan and Jibdhan Charan, on the other. The validity of the grant of 1909 was directly in issue, and the decision was in favour of its validity. The respondents contend that this decision operates as *res judicata*, and that therefore the validity of the grant cannot now be questioned by the appellant whose father was a party to the suit of 1917. For the appellant it was urged that the suit was in effect a collusive suit between Jadu Charan and Bindeshwari ; that Ramdhan Charan was only a pro forma defendant and that in any case the decision does not bind Bindeshwari Charan. With neither of the appellant's contention can I agree. Succession to the estate is governed by the rule of lineal primogeniture. Ramdhan was, at the time of the suit, the next heir and vitally interested in contesting the validity of the grant ; he did in fact contest it in the written statement which he filed. I do not understand on what principle it is arguable that Bageshwari Charan, who now holds the estate, is not bound by the decision obtained against his father at a time when his father was the next heir, merely on the ground that he himself was not a party to the suit. The application of the doctrine of *res judicata* is however also resisted on another ground with which I shall deal later.

With respect to the alleged collusion, the appellant urges that the suit of 1917 was merely an attempt by Jadu Charan and Bindeshwari to obtain a recognition

of a grant to which the Commissioner's sanction had not been accorded. In his written statement in that suit Ramdhan alleged that the suit had been instituted by Bindeshwari Charan in collusion with Jadu Charan who was defendant 1 and Jibdhan Charan who was defendant 3. The Subordinate Judge found that no collusion had been proved. When the facts are examined it will be clear that there was no such collusion as to entitle the present appellant to say that the decision is not binding on him. The custom alleged by the appellant not having been proved there would have been no bar to Jadu Charan's making a substantial khorposh grant to his youngest son had his estate not been subjected to the Chota Nagpur Encumbered Estates Act. The present appellant could not have challenged such a grant. If Jadu Charan had, with the sanction of the Commissioner made such a grant to Bindeshwari after S. 12-A became operative in his estate, Bagheshwari could not have impeached the grant. How then can Bageshwari claim to be aggrieved merely because Jadu Charan and Bindeshwari attempted to achieve by a suit what could have been effected without a suit? I am of opinion that the alleged collusion was not such as to afford Bageshwari an effective cause for grievance.

Reverting to the question of the operation of the doctrine of res judicata on the grant of 1909, the point for determination is whether the decision in the 1917 suit can render valid a transaction which sub-S. (3), S. 12-A declares to be void. It is true that in a proper case a decision on a question of law attracts the operation of the doctrine of res judicata as effectively as a decision on a question of fact. That there may be cases however in which a decision on a question of law does not operate as res judicata was suggested by Rankin, C. J., in *Tarini Charan v. Kedar Nath* (2), and there is a decision of a Division Bench of the Allahabad High Court in *Manohar Lal v. Baldeo Singh* (3) which is not without bearing on the point. That was a decision under the Agra Tenancy Act of 1901. S. 194 of that Act precludes a suit for rent by one cosharer except in two instances which are not material to the

present decision. The plaintiff sued for the whole rent due from the tenant defendants in respect of the holding although admittedly there were other persons besides himself who were cosharers in the holding as proprietors. It appears that there had previously been two similar suits by the plaintiff against the defendants and that the defendants had not pleaded S. 194 in bar. In the third suit they did plead the section, but the plaintiff contended that they were debarred by the rule of res judicata from doing so. Ashworth, J., in overruling the plaintiff's contention said :

"In my opinion where the law forbids a certain thing being done in a suit no amount of failure by the defendant in the previous suit to plead the positive bar created by the legislature will prevent its being taken up in a subsequent suit."

Walsh, J., who was the other member of the Bench, contented himself with the observation that he was satisfied that there was no res judicata. A somewhat similar question has been decided in this Court with reference to S. 47, Chota Nagpur Tenancy Act, 1908. In *Rup Nath v. Jagan Nath* (4) an attempt was made to sell a raiyati holding in execution of a mortgage decree in spite of the prohibition contained in S. 47. Objection to the sale was taken in and allowed by the Court executing the decree, but was overruled in appeal. The decision of the appellate Court was reversed by the High Court (Kulwant Sahay and Macpherson, JJ). Kulwant Sahay, J., said :

"The second part of S. 47 expressly forbids the sale of the right of a raiyat in his holding in execution of any decree, and the fact that the decree under execution is a mortgage decree directing the sale of the land in question does not in any way affect the provisions of S. 47 of the Act."

Macpherson, J., observed :

"It is altogether illegal to sell a raiyatward right in land even in execution of a decree or order directing such a sale."

Then, in another case, *Joychand Kumar v. Bhutnath Khan* (5) S. 47 was pleaded in the trial Court and overruled. The objection was again raised in the execution proceedings and overruled by the lower Courts on the ground that the question was res judicata. This decision was reversed by the High Court (Kulwant Sahay and Dhavle, JJ.) who held that the judgment-debtor was not concluded by the rule of res judicata from raising

(2) A. I. R. 1928 Cal. 777=115 I. C. 593 (F.B.)

(3) A. I. R. 1927 All. 505=49 All. 918=103 I. C. 279.

(4) A. I. R. 1928 Pat. 227=7 Pat. 178=107 I. C. 145.

(5) A. I. R. 1930 Pat. 236=125 I. C. 561.

the question in the execution proceedings. Now the third subsection of S. 12-A declares that an alienation or charge made without the previous sanction of the Commissioner is void, that is to say, it is void ab initio. The grant of 1909 was in my opinion still born and the decision in the suit of 1917 could not impregnate it with life. I therefore hold that we are not bound to treat the grant of 1909 as valid merely by reason of the conclusion as to its validity arrived at by the learned Subordinate Judge in the 1917 suit.

With respect to the grant of Sch. B lands, that is to say, the lands covered by the grant of 1920 other than Sch. A land, the respondent's contention is as follows. He says that S. 23 empowers the Courts in Chota Nagpur to entertain suits relating to claims of maintenance from any immovable property brought under the operation of the Act; that the suit of 1917 was a suit contemplated by S. 23; that the suit resulted in Bindeshwari obtaining a decree declaring him to be entitled to get as maintenance from Jadu Charan properties yielding an income of Rs. 4,000 a year; that for the purpose of assuring this income to Bindeshwari the decree directed Jadu Charan to convey to him lands of the annual value of Rs. 2,700 in addition to the lands covered by the grant of 1909, the annual value of which is Rs. 1,300. The respondent says that the decree created a charge on the estate and that the grant of 1920 was merely a carrying out of the directions given in the decree; and that the sanction of the Commissioner was not required to validate the grant. The argument is based on the assumption that the suit of 1917 was a suit to which the provisions of S. 23 applied. This however is a fallacy as will be apparent from an examination of this section and S. 21-B. As originally enacted S. 23 is as follows:

"Nothing in this Act precludes the Courts in Chota Nagpur having jurisdiction in suit relating to succession to, or claims of maintenance from any immovable property brought under the operation of this Act, from entertaining and disposing of such suit, but to all such suits the manager of such property shall be made a party."

In 1909 S. 21-B was introduced into the Act. That section provides that "during the period of management" the manager shall be made a party to all suits and appeals by or against the holder of the estate. By the same Amending Act the word "subject to the provisions of

S. 21-B" were prefixed to S. 23. This rendered superfluous the last fifteen words of S. 23 (namely, "but to all such suits the manager of such property shall be made a party"), and they were repealed by the same Act. From the above it is clear that S. 23 applies only to certain suits instituted during the period that an estate is under management under the Act. The suit of 1917 was instituted after the estate had been released to Jadu Charan and before it was again taken under management. The suit of 1917 therefore was not brought under S. 23 of the Act, but under S. 9, Civil P. C. The only effect of the decree in that suit was to declare Bindeshwari to be entitled to obtain from Jadu Charan properties yielding an annual income of Rs. 4,000. But Jadu Charan was incompetent to give effect to the decree unless the Commissioner sanctioned a transfer or charge under S. 12-A. The Commissioner has not done so, and there is no evidence that subsequent to the decree he has been asked to do so.

On this part of the case the appellant referred to *Khitnarain Sahi v. Surju Seth* (6) in which it was held that S. 12-A is a bar to the execution sale of land belonging to a disqualified proprietor unless the Commissioner sanctions the sale. The decision in *Rup Nath Mondal v. Jagan Nath Mondal* (4) cited above is also in point; for in that case it was held that a decree directing the sale of a raiyati holding cannot override the prohibition contained in S. 47, Chota Nagpur Tenancy Act, 1908 forbidding the sale of such a holding in execution of a decree. The conclusion at which I have arrived is therefore that the appeal must be allowed, the decision of the Subordinate Judge set aside and the suit decreed with costs.

James, J.—I agree.

K.N./R.K. *Appeal allowed.*

(6) A. I. R. 1931 Pat. 364=10 Pat. 582=132
I. C. 868.

A. I. R. 1932 Patna 342

JAMES, J.

Bijoy Singh—Petitioner.

v.

Raja Kirtyanand Singh and others—
Opposite Parties.

Civil Revn. No. 653 of 1931, Decided on 4th August 1932, against order of Munsif, Bhagalpur, D/- 8th October 1931.
Civil P. C. (1908), O. 21, Rr. 85 and 86—
Purchaser bringing money on last day un-

able to deposit it owing to delay in passing challans in spite of his diligence—Order setting aside sale is revisable—Civil P. C. (1908), S. 115.

Where the auction purchaser sufficiently complied with R. 85, O. 21, when he came to the Court at the opening hour of the 15th day with the money, prepared to make his deposit, and diligently took the steps required by the Departmental Rules, he cannot be held responsible for the obstruction which was caused by the delay in passing the challans and a Court holding that the sale must be set aside as the money was not paid in time acts illegally and with material irregularity in the exercise of its jurisdiction: 8 Cal. 528 and 7 Mad. 211, Ref. [P 343 C 2]

J. C. Sinha—for Petitioner.

K. P. Shukul—for Opposite Parties.

Judgment.—The petitioner purchased certain property at a Court sale on 8th May 1931. He duly deposited the earnest money, and under R. 85, O. 21 the balance had to be paid into Court before the close of the 15th day. At 10-30 a.m. on the 15th day the petitioner came with the balance of the purchase money which he tendered with the challans to the chief ministerial officer of the Court. The challans were made over to the Judge in charge for signature but the petitioner did not get them back on that day and without them the money could not be paid into the treasury. The challans were not returned until the next open day, when the petitioner duly deposited the balance of the purchase money in the treasury. When the time came for confirming the sale the Munsif of his own motion decided that as the whole of the purchase money had not been deposited in time, the sale must be set aside under O. 21, R. 86, Civil P. C.

Mr. J. C. Sinha for the petitioner argues that he had done all that he could do in order to make his deposit in time; and the fact that delay on the part of the Court rendered it impossible for him to make a deposit within the period allowed ought not to make him liable to the penalty prescribed by O. 21, R. 86. He relies upon a decision of the Calcutta High Court in *Gujadhur Pauree v. Naik Pauree* (1), wherein it was held that where a decree directed the payment of money into Court within a limited time, it would be sufficient compliance with the decree if the judgment-debtor brought the money into Court within that time and diligently took the necessary steps required by the Departmental rules for its actual payment into

(1) [1882] 8 Cal. 528.

the treasury. This decision was followed in *Srinivasa Bhatta v. Malayacha Mannadi* (2) in a case in which the balance of purchase money for a Court sale could not be paid into Court on the 15th day, though the challans had been obtained in time. It is suggested on behalf of the judgment-debtor that the rule laid down in O. 21, R. 86 is imperative; and that even if the learned Munsif erred in his application of it, there was no want of jurisdiction such as would justify interference under S. 115, Civil P. C. But the petitioner in this case has been able to make out that the Munsif acted in the exercise of his jurisdiction illegally and with material irregularity; and the order to which objection is taken must be set aside. The auction-purchaser sufficiently complied with R. 85, O. 21, Civil P. C., when he came to the Court at the opening hour of the 15th day with the money prepared to make his deposit and diligently took the steps required by the Departmental Rules; he cannot be held responsible for the obstruction which was caused by the delay in passing the challans.

The application is accordingly allowed. The petitioner is entitled to his costs from the contesting judgment-debtors: hearing fee two gold mohurs.

M.N. *Application allowed.*

(2) [1883] 7 Mad. 211.

A. I R. 1932 Patna 343

KULWANT SAHAY AND ROWLAND, JJ.

Janki Saran Sahi—Objector—Appellant.

v.

Rambabadur Sahi and another—Applicants—Respondents.

First Appeal No. 76 of 1930, Decided on 16th August 1932, against decision of Dist. Judge, Muzaffarpur, D/- 14th February 1930.

Succession Act (1925), S. 284—Objector claiming paramount title—Question of title cannot be decided by probate Court—Probate.

In order to give a locus standi to the objector he must claim some interest in the estate of the testator. But where objectors are claiming a paramount interest and challenging the title of the testator a probate Court cannot enter into a question of title. The will if proved, letters of administration must stand. [P 344 C 1, 2]

S. N. Rai and B. N. Rai—for Appellant.

Kulwant Sahay, J.—This is an appeal against two orders of the District

Judge of Muzafferpur, one dated 12th February 1930 and the other dated 14th February 1930. By the first of these orders the learned Judge held that the present appellant had no locus standi to object to the grant of letters of administration in respect of the estate of one Mt. Lakho Kuer. The case of the applicants for letters of administration was that Mt. Lakho Kuer had executed a will dated 5th August 1928, in their favour in respect of certain properties which she acquired under a deed of gift dated 19th November 1923, executed by her husband Ramnandan Sahi in her favour. The objectors alleged that Ramnandan Sahi had no right to execute the gift and that the testatrix Mt. Lakho Kuer obtained no title under the gift to the estate in respect of which letters of administration could be granted. The learned Judge held that the objectors had no locus standi to object to the grant inasmuch as they were claiming as the nearest agnates of the husband of the testatrix and as such entitled to all the properties covered by the will.

It was contended before the learned Judge that Ramnandan Sahi had renounced the world and had become an ascetic and that therefore he had no right to execute a deed of gift in favour of his wife. But it had been held in a previous litigation that it had not been proved that Ramnandan had renounced the world. The learned Judge therefore held that if the objectors wanted to object to the grant they must establish that Ramnandan had become an ascetic after the date of the judgment in the previous litigation, and he made an observation to the effect that they must establish it in a proper suit and if they succeeded therein it would be open to them to move the Court for revocation of letters of administration. By the second order of 14th February 1930 the learned Judge held that the will had been proved and ordered the issue of letters of administration on furnishing security.

It was contended by the learned advocate for the appellant that the learned Judge was wrong in holding that the objectors had no locus standi. It is clear that in order to give a locus standi to the objector he must claim some interest in the estate of the testatrix. Here the objectors are claiming a paramount inte-

rest and challenging the title of the testatrix. A probate Court cannot enter into a question of title. Mr. Shivanandan Rai produced before us a copy of the judgment of the District Judge passed after remand by the High Court in the litigation reference to which is made by the District Judge and he wanted to show that it has now been established that Ramnandan had no right to execute the gift. Even then I think that it is not a ground for objection to the grant of letters of administration. He can have his title declared in a regular suit in the presence of the person to whom letters of administration have been granted and claim possession from him; but as a probate Court the question of title cannot be gone into. The will having been proved letters of administration must stand. This appeal is dismissed but as there is no appearance on the side of the respondents there will be no order for costs.

Rowland, J.—I agree. The observation of the District Judge that if the objector obtains a declaration regarding the civil death of Ramnandan he may apply again to the probate Court cannot I think be supported and must be considered as obiter dictum. If the District Judge will refer to *Ram Das v. Prem Das* (1), and the authorities there cited he will see that such an application for revocation would not be maintainable any more than the present objection. It would be for the present objector to obtain in a regular title suit both the relief of declaration and the relief as to possession.

R.K. *Appeal dismissed.*

(1) A. I. R. 1932 Pat. 95=10 Pat. 817=136 I. C. 296.

A. I. R. 1932 Patna 344

ROWLAND, J.

Jagmohan Singh and others — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 134 of 1932, Decided on 6th April 1932, against order of Joint Magistrate, Monghyr, D/- 10th February 1932.

(a) **General Clauses Act (1897), S. 3 (25)** — "Immovable property"—Standing crops are included.

In S. 3 (25) the expression "immovable property" has a wider definition which would include standing crops, etc. [P 345 P 1]

(b) **Penal Code (1860), S. 379**—Auction purchaser entering into possession of land—Accused cutting bamboo clumps standing

on land—Accused held guilty under S. 379—Transfer of Property Act (1882), Ss. 3 and 8.

On the auction purchaser of a holding, in an execution sale taking possession of the holding the accused cut and removed bamboo clumps standing on the land.

Held: that the accused were guilty under S. 379, as under S. 8 read with S. 3, T. P. Act, when the auction-purchaser acquired the land he acquired the bamboos too and possession over them passed to him with possession of the land: *A I. R. 1923 Pat. 355 and 4 Cal. 814, Doubted.* [P 345 C 2]

S. P. Verma and K. P. Upadhyaya—for Petitioners.

G. C. Das—for the Crown.

Judgment.—The complainant Deoki Pande was auction-purchaser, at a rent execution sale, of a holding of Gokul Rai and others; he took delivery of possession on 16th July 1931. There were bamboo clumps standing on the land. Some weeks later, the petitioners cut and removed all the bamboos, 236 in number. They have been, for this act, prosecuted and convicted under S. 379, I. P. C. It was contended for them in the trial that they were in possession of the land since several years by virtue of purchase from the original raiyat; but this plea was not accepted. It is argued in revision that though in the findings of the Courts below possession of the lands has passed to the complainant, it does not follow that possession of the bamboos also passed.

Standing crops it is pointed out are included in the definition of "moveable property" in S. 2 (13), Civil P. C.; and standing timber, growing crops and grass are excluded from the definition of "immovable property" in S. 3, T. P. Act. In S. 3 (25), General Clauses Act on the other hand "immovable property" has a wider definition which would include standing crop, etc. The sale and delivery of possession, it is argued, referred to immovable property; and therefore it is contended the right to the possession over moveable property on the land did not pass. The decision in *Dhobi Roy v. Mahadeo Singh* (1) followed cases such as *Afatoonla Sirdar v. Dwarka Nath* (2) decided before the present definition of "moveable property" was inserted in the Civil Procedure Code, and it is open to argument that these decisions are no longer good

law. The argument is ingenious, but cannot stand in face of S. 8, T. P. Act, where it is said;

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. Such incidents include where the property is land all things attached to the earth."

The expression "attached to the earth" is defined in S. 3. The first of its meanings is "rooted in the earth as in the case of trees and shrubs." The Courts below were therefore right in the view that when complainant acquired the land, he acquired the bamboos too; and that possession over them passed to him with possession of the land. The rule is discharged and the application dismissed.

R.M./R.K.

Rule discharged.

A. I. R. 1932 Patna 345 Special Bench

COURTNEY-TERRELL, C. J., WORT
AND FAZL ALI, JJ.

Simon Lakra

v.

Mt. Sugan Bakhla

Matrimonial Ref. No. 1 of 1930, Decided on 4th March 1932, made by Judl. Commissioner, Chota Nagpur, D/- 19th August 1930.

(a) **Divorce Act (1869), S. 10—Divorce for adultery—Nature of proof explained—(Obiter).**

Obiter: Petitions for divorce are not of the character of an ordinary undefended civil suit. The adultery requires direct proof either by that of eyewitnesses or irresistible inference, and direct proof is required of the identity of persons charged with adultery. [P 346 C 1]

(b) **Divorce Act (1869), S. 10—Adultery—Proof by birth of child—Maternity must be proved.**

Where it is proposed to prove the alleged adultery by calling evidence as to the birth of a child, since the separation of the husband and the wife, the evidence should be directed to the maternity of the mother in relation to the child; and the mere statement that a child has been found or seen living in the same house with the wife is not ordinarily sufficient to establish that that child is her child.

[P 346 C 1]

K. K. Banerji—for Reference.

Order.—This is a reference made by the Judicial Commissioner of Chota Nagpur for a decree absolute in a petition for divorce for which a decree was granted by him. The petitioner Simon

(1) A. I. R. 1923 Pat. 355=73 I. C. 451.

(2) [1879] 4 Cal. 814=4 C. L. R. 95.

Lakra is a member of the Lutheran community, at Uraon of the district of Ranchi and he was married to the respondent in the year 1924. He lived with his wife for a period of about seven months; they had no children. The wife then left him and went off to live with her sister-in-law at a distant village; from the sister-in-law's place she went to live with a man in the Jaspur estate. Evidence has been called consisting of the evidence of the petitioner himself who proves the marriage and proves that he lived with his wife for this period of seven months and had no children; that she left him and went away to her sister-in-law, and that she is now living with the co-respondent. That evidence is corroborated by that of a witness who is apparently a neighbour of the petitioner, and both of the witnesses say that they had been to the house of the co-respondent where they found the respondent living, and that she had with her a child who was under five years of age and therefore must have been born from cohabitation after the time when she left the petitioner's household.

We think it necessary to make some observations with regard to the evidence which is often considered satisfactory by the District Courts to prove the adultery alleged. Petitions of this sort are not of the character of an ordinary undefended civil suit. The adultery requires direct proof either by that of eye-witnesses or irresistible inference, and direct proof is required of the identity of persons charged with adultery. In the majority of cases the conclusion reached is an inference from evidence which is not sufficient in law to justify the inference. The District Judges and the advocates who appear before them in these cases should be careful so to examine the witnesses when they give their evidence-in-chief that the act of adultery is established without possibility of other inference. In the case where it is proposed to prove the alleged adultery by calling evidence as to the birth of a child, since the separation of the husband and the wife, the evidence should be directed to the maternity of the mother in relation to the child; and the mere statement that a child has been found or seen living in the same house with the wife is not ordinarily

sufficient to establish that that child is her child.

The decree nisi however in this case will be made absolute

R.K.

Decree made absolute.

A. I. R. 1932 Patna 346

MOHAMAD NOOR AND DHAVLE, JJ.

Surajman Prasad Misra—Plaintiff—Petitioner.

v.

Sadanand Misra and others—Defendants—Opposite Parties.

Civil Revn. No 291 of 1931. Decided on 2nd March 1932, against order of Munsif, Aurangabad, D/- 19th February 1930.

(a) **Precedents—Failure to follow decision of single Judge of High Court by lower Courts is material irregularity within Civil P. C. (1908), S. 115.**

The decision of a single Judge of the High Court being the decision of a superior Court ought to be followed by the District Judge and in failing to do so he acts with material irregularity in the exercise of his jurisdiction.

[P 347 C 1]

(b) **Negotiable Instruments Act (1881), S. 78—Suit by real owner making holder benamidar party is maintainable if discharge can be given.**

In a suit on a pro-note in which the holder, though not a plaintiff is a party and the plaintiff real owner is in a position to give to the drawer through the holder a discharge, the plaintiff can maintain the suit: *A. I. R. 1930 Pat. 313*, and *A. I. R. 1928 Cal. 148, Rel. on : A. I. R. 1928 Pat. 24, Expl.*; *A. I. R. 1922 All. 70; 30 Mad. 88*, and *A. I. R. 1928 Nag. 54, Dist.*; *A. I. R. 1918 P. C. 146* and *A. I. R. 1927 Mad. 219, Ref.*

[P 348 C 1]

(c) **Limitation Act (1908), S. 22 (2)—Suit on pro-note by real owner making benamidar defendant—Transposition of defendant does not affect limitation—It should be allowed as defendant's rights are not prejudiced—Limitation Act (1908), S. 28—Civil P. C. (1908), O. 1, R. 10—Negotiable Instruments Act (1881), S. 78.**

In a suit on a pro-note by the real owner impleading the holder benamidar as a defendant if the holder wishes to be made a plaintiff, he ought to be allowed to do so. Such a transposition does not prejudice the debtor by depriving him of the plea of limitation as the change does not affect limitation under S. 22 (2) and as under S. 28 the defendant gets no vested right by mere efflux of time: *A. I. R. 1928 Pat. 24, Diss. from.*

[P 348 C 2 P 349 C 1]

G. P. Singh—for Petitioner.

Sarjoo Prasad—for Opposite Parties.

Mohamad Noor, J.—This is an application in revision directed against a decree of the District Judge of Gaya, dismissing the plaintiff's appeal against a decree of the Munsif of Aurangabad which in its turn dismissed the plaintiff's

suit based upon a promissory note. The note in question is said to have been executed by defendant 1 as the manager of the joint family consisting of himself and his two sons (defendants 2 and 3) in favour of defendant 4 alleged to have been a benamidar of the plaintiff. The plaintiff averred that at the time when the loan (the consideration of the pro-note) was advanced he was a minor and therefore the note was taken in the name of defendant 4. The defence inter alia was a denial of execution of the pro-note, the passing of the consideration and the plaintiff's right to sue.

The trial Court without going into the merits dismissed the suit. It held that under S. 78, Negotiable Instruments Act, the holder (as defined in S. 8) was the only person who could give discharge to the drawer and therefore no other person was entitled to maintain the suit. It relied upon two decisions of the Madras High Court and a decision of a learned Judge of this Court sitting singly in *Ramdas Sahu v. Chhota Lal* (1). The last case did not however decide the question and I shall refer to it later. Another Single Judge decision of this Court in *Sarjoog Singh v. Deosaran Singh* (2) taking a contrary view does not seem to have been brought to the notice of the learned Munsif. On appeal the learned District Judge dismissed the appeal. *Sarjoog Singh's* case (2) and the decision of the Calcutta High Court in *Brojo Lal Saha Banikya v. Budhnath Pyari Lal & Co.* (3), on which it was based, was brought to his notice, but he preferred to follow the Madras and the Allahabad decisions as being in his opinion more in consonance with the Act. In my opinion the decision of a single Judge of this Court, though not binding on us sitting in a Division Bench, being nevertheless the decision of a superior Court ought to have been followed by the learned District Judge and in not doing so he has acted with material irregularity in the exercise of his jurisdiction.

Now the question is whether any person other than a holder can maintain a suit on the allegation that the holder was the plaintiff's benamidar. Strictly speaking there is only one decision of

this Court on this point, viz., that in *Sarjoog Singh's* case (2). The case of *Ramdas Sahu v. Chhota Lal Mande* (1) relied upon by the learned Munsif did not, as was pointed out by the learned District Judge in this case and by Kulwant Sahay, J., in *Sarjoog Singh's* case (2), decide the point. It was conceded in that case that such a suit as the present one was not maintainable. The question of the maintainability of the suit was neither argued nor decided. In that case (as in this) the holder was a defendant and had asked to be made a plaintiff. The lower Court refused this. The learned Judge held that it being conceded that the suit as it stood was not maintainable, the lower Court exercised a correct discretion in not allowing the holder to be made a plaintiff and thereby destroying the valuable right acquired by the defendant by virtue of the law of limitation. Later on I shall have to revert to this decision as I propose to allow defendant 4 of this suit to be made a plaintiff if he so desires.

The trend of the decisions of the Madras and the Allahabad High Courts is in support of the view that no other person than the holder of the promissory note can maintain an action thereon; but in none of the cases the question was directly in issue and decided. The Calcutta High Court has taken a contrary view in the case of *Brojo Lal Saha Banikya v. Budhnath Pyarilal & Co.* (3), and that case was followed by a learned Judge of this Court in *Sarjoog Singh's* case (2). Now it is well settled that a decision of a particular case is strictly speaking, confined to the facts of that case and the observations made therein need not necessarily be applied to another case unless the facts of the latter case justify this application. It is easy to conceive cases which though in form are on behalf of the beneficiaries or, in other words, on behalf of persons other than the holders of promissory notes, in reality and in substance they are suits by the holders themselves and in such suits plaintiffs are in a position to give through the holders complete discharge to the drawers. Therefore suit of such a nature is in effect by the drawer himself and the principle enunciated by the Madras and the Allahabad High Courts cannot strictly be made applicable to it. For instance in the Allahabad case of *Reoti Lal v. Manna*

(1) A. I. R. 1928 Pat. 24=104 I. C. 526.

(2) A. I. R. 1930 Pat. 313=123 I. C. 395.

(3) A. I. R. 1928 Cal. 148=105 I. C. 549=55 Cal. 551.

Kunwar (4), the holder of the hand-note died without any heir and nobody was before the Court capable of giving a discharge to the drawer. The suit was dismissed.

The observations of the learned Judges are no doubt somewhat general, but as far as the facts of that particular case were concerned, the considerations which influenced the decisions in the Calcutta case and in *Sarjoog Singh's* case (2) in this Court did not apply. In the Full Bench decision of the Madras High Court in *Subba Narayana Vathiyar v. Ramaswami Aiyar* (5), though again the observations of the learned Judges were general, the real decision was only this much: that in a suit by the holder of a promissory note the plea that the plaintiff was the benamidar was not maintainable. Here again one who was under the law competent to give a discharge was the plaintiff; the defendant was not allowed to plead that somebody else was the beneficiary of the promissory note. In *Sadasuk Jankidas v. Siri Kishan Pershad* (6), their Lordships of the Judicial Committee in fact held that it was not open to either party to a hundi to show either by way of claim or defence that the signatory was in reality acting for an undisclosed principal.

The learned advocate for the opposite party (Mr. Sarjoo Prasad) has drawn our attention to a decision of the Judicial Commissioner of Nagpur [*Vishnu v. Achut* (7)], where it was held that a person could not maintain a suit on a pro-note on the allegation that the holder was his benamidar. It is not clear from the judgment of this case if the holder was a party to the suit and whether the plaintiff was in a position through the holder to give a discharge to the drawer. In fact none of these cases is an authority for the proposition that in a suit in which the holder, though not a plaintiff is a party, and the plaintiff is in a position to give to the drawer through the holder a discharge, the plaintiff cannot maintain the suit.

On the other hand in the Calcutta case the promissory note was in the name of one Pyarilal Das and the suit was on be-

half of the firm of which Pyarilal Das was a partner. In fact it was he who had verified the plaint. It was held that the suit was on behalf of the holder and therefore the Court decreed the suit. In *Sarjoog Singh's* case (2) the holder of the hand-note was a defendant in the suit who had appeared in Court and stated that he was a mere benamidar. In fact he was ready to give the defendant (the drawer of the promissory note) a complete discharge. The learned Judge directed the suit to be tried on the merits. As I have said the facts on which decrees were passed in the Calcutta case and on which this Court decided *Sarjoog Singh's* case (2) are not covered by any of the decisions of the Madras and the Allahabad High Courts or of the Privy Council. I am not prepared to say that a beneficiary can maintain a suit on a promissory note without any reservation or restriction. But in a case where in effect the suit is by the holder himself different considerations arise and I see no reason why the suit should be dismissed. I may here refer to the case of *Swaminatha Odayar v. Subbarama Ayyar* (8) where this principle was followed. In that case plaintiff 1 sold some properties to the defendant and for the balance of the purchase money took from him a promissory note in favour of his mother, plaintiff 2. Plaintiff 1 then wanted to enforce his lien on the property sold for the balance of the consideration money. It was held that plaintiff 1 having accepted a promissory note for the balance of the consideration money his lien was lost, but as the holder (plaintiff 2) was willing that a simple money decree on the basis of the hand-note be passed in favour of plaintiff 1, the beneficiary, this was done.

The learned Munsif should not have dismissed the suit on the preliminary ground and should have allowed the plaintiff an opportunity of producing the holder to support the plaintiff's case and give a discharge to the defendant if he wanted. I am also of opinion that if the holder wishes to be made a plaintiff, he ought to be allowed to do so. I have already referred to the decision of Allanson, J., in *Ramdas Sahu v. Chhota Lal* (1), where the learned Judge held that such a transposition of the defendant to

(4) A. I. R. 1922 All. 70=65 I. C. 785=44 All. 290.

(5) [1907] 30 Mad. 88=16 M. L. J. 508 (F.B.).

(6) A. I. R. 1918 P. C. 146=50 I. C. 216=46 I. A. 33=46 Cal. 663.

(7) A. I. R. 1928 Nag. 54=105 I. C. 780.

(8) A. I. R. 1927 Mad. 219=100 I. C. 10=50 Mad. 548.

the category of the plaintiff should not be allowed as it would deprive the defendant of a valuable right. With utmost respect I disagree with him. First of all in suits for money efflux of time only bars the remedy through Court, but does not destroy the right and does not vest any right in the defendant. S. 28, Lim. Act, is confined to immovable properties. Secondly, the legislature has by enacting sub-Cl. (2), S. 22, Lim. Act, recognized that if a person is a party to a suit, his change of position will not affect limitation; and it was to meet cases like these that it has been provided that if a party already on the record is transferred from the category of the defendant to that of the plaintiff or vice versa, the provisions of Cl. (1) will not apply; and, I think, in a proper case the Court will be exercising a wise discretion if it allowed such transpositions in order to give relief to an aggrieved party. To disallow this on the ground given by the learned Judge will be defeating the very object which the legislature had in view.

I would therefore remand this case to the first Court for trial on the merits. If defendant 4, the alleged benamidar, applies to be made a plaintiff in the suit, this will be allowed and the suit disposed of on the merits on the lines I have indicated. In the circumstances of the case, I think the parties should bear their own costs, so far incurred by them. The costs of rehearing will abide the result of the suit.

Dhavle, J.—I agree.

M.N.

Case remanded.

A. I. R. 1932 Patna 349

COURTNEY-TERRELL, C. J. AND
FAZL ALI, J.

Domi Lal Sahu and others—Appellants.

v.

Bijoy Prasad Singh and others—Respondents.

Appeals Nos. 9 and 12 of 1932, Decided on 25th August 1932, against appellate order of Dist. Judge, Monghyr, D/- 1st August 1931.

(a) Limitation Act (1908), S. 5—Two appeals against one order with one copy—Time required for furnishing second copy was extended.

Two appeals were filed against one order only one copy of which was filed. On demand a second copy was furnished but it was after the expiry of limitation for filing appeals:

Held: that this is a fit case in which the period of limitation should be extended under S. 5. [P 349 C 2]

(b) Civil P. C., (1908), O. 21, R. 53—Money decree cannot be sold—R. 53 must be followed—Civil P. C. (1908), O. 21, R. 64.

A money decree cannot be sold in execution and once such a decree is attached the procedure indicated in O. 21, R. 53, should be followed: *Case law referred.* [P 350 C 2]

Sarjoo Prasad—for Appellants.

B. P. Sinha—for Respondents.

Fazl Ali, J.—A preliminary point was raised on behalf of the respondents that one of these appeals (Appeal No. 12 of 1932) is barred by limitation. It appears that the appellate order against which these appeals are directed was passed by the Court below on 1st August 1931. Two appeals were filed in this Court against this order on 2nd November 1931, but only one copy of the order appealed against was filed and that copy was filed by the appellants in Appeal No. 9 of 1932. On the report of the Stamp Reporter that another copy of the order should have been filed in Appeal No. 12 an order was made directing the appellants concerned to file a copy and it was filed on 12th January 1932. It is contended by the respondents that as the copy of the order appealed against was filed on 12th January 1932 the appeal must be taken to have been duly presented on that date and not on 2nd November 1931 on which date the memorandum of appeal was filed. Technically that would be so, but, in my opinion, this is a fit case in which the period of limitation should be extended under S. 5, Lim. Act. Passing now to the merits of the case a few facts may be briefly stated. On 29th October 1918 the appellants obtained a mortgage decree as well as a decree for costs against one Domi Lal Sahu, a namesake of one of the appellants. The mortgage decree was satisfied by the sale of the mortgaged properties and in 1926 the appellants applied for execution of the decree for costs. It appears that Domi Lal Sahu, the judgment-debtor, had taken out execution against the predecessors-in-interest of the respondents in respect of a money decree which he held against them. This decree was sold in execution of the appellants' decree and was purchased by the appellants with the result that the execution case in the course of which this decree was purchased was dismissed in 1927. Subsequently in 1929 the appellants

started a fresh execution case and in the course of this execution they purchased certain properties belonging to the respondents.

It may be mentioned here that on 13th January 1930, three days before the sale, certain objections were raised by the respondents to the execution proceedings but they were dismissed for default on 16th January 1930. On that day the properties in question belonging to the respondents were sold and purchased by the appellants. The respondents then preferred certain objections against the sale both under S. 47 and under O. 21, R. 90, Civil P. C. One of these objections was that the money decree which Domi Lal Sahu, the judgment-debtor of the appellants, had obtained against the respondents could not be sold in execution of the appellants' decree and that the appellants should have followed the procedure laid down in O. 21, R. 53, Civil P. C., to realize their decree. Another objection was that one Narendra Prasad Singh one of the judgment-debtors against whom Domi Lal Sahu sought to execute his decree and who also represented the other minor judgment-debtors had died before the passing of the decree and so the decree obtained by Domi Lal Sahu was a nullity and incapable of execution. The third objection was that the processes in the execution proceedings were not served at all and in fact could not have been served because they were directed against a dead person, amongst others.

The executing Court before which these objections were preferred held that the sale of the money decree was illegal and that the decree-holders not having proceeded under O. 21, R. 53 the sale of the properties of the respondents could not be upheld. It also came to the conclusion on certain oral and documentary evidence adduced on behalf of the respondents that Narendra Prasad Singh had died before the passing of the decree in favour of Domi Lal Sahu, the respondents' original judgment-debtor. The sale having been set aside, the appellants appealed to the District Judge of Monghyr who also upheld the contention of the respondents that the sale of the money decree was not provided for under the Code and that the procedure followed by the appellants was not in accordance with law. The learned District Judge how-

ever did not record a finding on the question as to whether Narendra Prasad Singh had died before the passing of the decree or not.

The main question argued before us is whether the view taken by the Courts below that the money decree could not be sold is correct. Mr. Sarjoo Prasad who appears for the appellants contends that O. 21, R. 53 being only one among the many sections of the Civil Procedure Code which provide for the various modes in which various kinds of properties are to be attached in execution of a decree cannot override O. 21, R. 64 which provides that the Court executing a decree may order that any property attached by it and liable to sale may be sold by the executing Court and the proceeds of such sale paid to the party entitled to receive the same. It is urged that the words of R. 64 are wide enough to include a money decree and that there is no express provision either in O. 21, R. 53 or anywhere else in the Code prohibiting the sale of a money decree by the executing Court. The argument is not without substance and receives some support from the language used in O. 21 R. 16 where it deals with a case in which a decree is transferred by operation of law. But on the other hand almost all the High Courts in this country seem to have taken the view that a money decree cannot be sold in execution and once such a decree is attached the procedure indicated in O. 21 R. 53 should be followed: see *Tiruvengada Chari v. Vythilinga Pillai* (1); *Jotindra Nath Chowdhry v. Dwarka Nath Dey* (2); *Sultan Koer v. Galzari Lall* (3); *Vithaldas Prabhu v. Subraya Manjappa* (4); *Maung Lun Bye v. Maung Po Nyun* (5); *Lachman Ojha v. Chariter Ojha* (6). It appears to me on a careful consideration of these decisions that the view which has been expressed in them must be adhered to and it is now too late to question its correctness. Upon an examination of the various provisions with regard to the attachment of properties it would appear that in no other rule is there any provi-

(1) [1883] 6 Mad. 418.

(2) [1893] 20 Cal. 111.

(3) [1878] 2 All. 290.

(4) A. I. R. 1921 Bom. 127=45 Bom. 343=59 I. C. 541.

(5) A. I. R. 1924 Rang. 21=1 Rang. 360=76 I. C. 679.

(6) [1919] 4 Pat. L. J. 336=48 I. C. 183.

sion corresponding to sub-Cl. 2, O. 21, R. 53 that clause runs as follows:

"(2) Where a Court makes an order under Cl. (a), sub-R. (1) or receives an application under sub-head (2) of Cl. (b) of the said subrule it shall on the application of the creditor who has attached the decree or his judgment debtor proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed."

The subrule thus provides that the attaching creditor may at once proceed to execute the attached decree as if he is the representative of the holder of that decree. It is clear that if this mode is adopted no sale of the attached decree would be necessary and it appears to me to be permissible to argue that if the framers of the Code contemplated the sale of the attached decree it was unnecessary for them to make this provision. It further appears to me that this provision has been inserted in the Code not only to avoid multiplicity of execution proceedings but also to safeguard the interests of the holder of the attached decree. If the procedure indicated by sub-R. (2), O. 21, R. 53, is followed the surplus if any which might be left after satisfying the decree of the attaching creditor will become available for the benefit of the holder of the attached decree but if the decree was liable to be sold in execution this result may not always follow. In the other provisions which relate to the mode of executing and attaching varying kinds of property no express provision is made as to the mode in which the decree is to be realized and it may therefore be inferred that in those cases the attachment must be followed by the sale of the property attached. The reference in O. 21, R. 16 to those cases where the decree is transferred by operation of law is capable of explanation inasmuch as sub-R. (2), O. 21, R. 53, applies only to a decree for money and for sale in enforcement of a mortgage or charge and some provision had to be made in respect of other kinds of decrees. I am therefore of opinion that the Courts below were correct in holding that the sale of Domi Lal Sahu's money decree was not warranted by law and the question now is whether the appellant could proceed to sell the properties of the respondents in their capacity as purchasers of that decree.

It was contended by Mr. Sarjoo Pra-

sad that the sale of the money decree should in the circumstances of the case be regarded as a merely redundant step and therefore liable to be ignored and it should be held that the appellants have substantially complied with the requirements of O. 21, R. 53 in this case. The difficulty however in the way of the appellants seems to be this. When they proceeded to get the money decree sold and purchased it their decree against Domi Lal Sahu was satisfied and their execution case was dismissed. Under O. 21, R. 57, upon the dismissal of an application for execution the attachment must be deemed to cease. It follows that the attachment ceased on 9th May 1927 upon which date the execution case was dismissed. The present execution case was started by the appellants two years later in the year 1929 and the steps which they took in this proceeding could be deemed to have been taken under O. 21, R. 53, only if it was shown that the property was still under attachment under that provision but as I have already stated the attachment had ceased to exist and in the present execution proceeding the appellants have proceeded in a new capacity, that is to say, in the capacity of persons who have purchased the money decree obtained by Domi Lal Sahu against the respondents. The procedure which was therefore adopted was not really the procedure which is contemplated in O. 21, R. 53, and it appears to me that the Courts below rightly held that the sale of the properties of the judgment-debtor in those circumstances could not be upheld. The respondents have further urged that Narendra Prasad being dead before the decree was passed the decree of Domi Lal Sahu was a nullity. This is no doubt a substantial point and it appears that the respondents have adduced both oral and documentary evidence in support of their allegation but unfortunately the lower appellate Court has not gone into the question as it should have done and in view of the fact that the appeals fail on the first point it is not necessary to deal with the matter any further. These appeals must be dismissed with costs.

Courtney-Terrell, C. J.—I agree.

M.N.

Appeal dismissed.

* A. I. R. 1932 Patna 352

MOHAMMAD NOOR AND DHAVLE, JJ.

Ram Autar Shukul—Plaintiff—Appellant.

v.

Baldeo Shukul—Defendant—Respondent.

Appeal No. 1304 of 1929, Decided on 28th July 1932, against appellate decree of Dist. Judge, Saran, D/- 18th September 1929.

* (a) Evidence Act (1872), S. 45—Alterations in deed pleaded—Court obtaining opinion in appeal as to date of stamp—Person opining not examined—Opinion is inadmissible—Evidence Act (1872), S. 61—Civil P. C. (1908), O. 41, R. 27.

In a suit on a handnote the defendant pleaded alterations in the note. The suit was decreed. In appeal the Court obtained a written opinion as to the date of stamp affixed and used it for giving judgment in favour of defendant.

Held: that the opinion not having been formally proved and the plaintiff not having been given an opportunity of cross-examining the person giving the opinion thereon ought not to have been taken in evidence, and the finding of the Judge based upon the opinion contained in that letter must be discarded. [P 352 C 2]

(b) Promissory note—Material alteration.

A plaintiff who comes to Court with tampered hand-notes is not entitled to any decree: *A.I.R.* 1924 *Cal.* 452 and 33 *Cal.* 812, *Foll.* [P 353 C 1]

P. R. Das, B. N. Mitter and Satyendra Nath Banarji—for Appellant.

Hareshwar Prasad Sinha—for Respondent.

Judgment.—This second appeal arises out of a suit by the plaintiff-appellant for recovery of Rs. 1,055-12 0 based on two hand-notes: one dated 1st Katrik 1332 purporting to be for a sum of Rs. 400 and the other dated 15th Aghan 1332, purporting to be for a sum of Rs. 225. The defendant admitted having borrowed from the plaintiff Rs. 40 on the first occasion and Rs. 25 on the other. He however alleged that these sums were paid up. The defendant's case was that he signed and put thumb impressions on blank pieces of papers specifying the amounts which he had borrowed on each occasion in the signature portion of the respective hand-notes and that the body of the hand-notes was not written at that time. His case was that the plaintiff changed the words and figures of Rs. 40 of the first hand-note and the words and figures of Rs. 25 of the second hand-note into Rs. 400 and Rs. 225 respectively and got the bodies

of hand-notes written to tally with those changes.

The learned Munsif, who tried the suit, found against the defendant holding that there was no alteration in either of the two hand-notes. He disbelieved the story of payment and consequently decreed the plaintiff's suit. The first hand-note purporting to be of Rs. 400 has two stamps of one anna each affixed to it. The signature and the acknowledgment of the debt in the handwriting of the defendant is on one of these two stamps; the other one has simply been crossed. The second hand-note has one stamp of one anna and on that is the signature of the defendant.

When the suit came up on appeal before the learned District Judge he sent the hand-notes to the Master, Security Printing India, Nasik, for an expression of opinion as to the date of the stamps affixed on the two hand-notes. A reply came from that officer, and the learned District Judge used the opinion expressed in it as one of the grounds for holding that the hand-notes were tampered with and after the scrutiny of the two hand-notes and on a consideration of the oral evidence held that in the first hand-note the words and figures of Rs. 40 had been converted into Rs. 400 and in the second the words and figures of Rs. 25 had been converted into Rs. 225. He did not however reverse the finding of the learned Munsif about the payment of Rs. 65, but held that under the circumstances of the case the plaintiff was entitled to no decree and dismissed the plaintiff's suit.

It has been contended before us by Mr. Das that the letter of the Master, Security Printing India, not having been formally proved, and the plaintiff not having been given an opportunity of cross-examining him thereon, ought not to have been taken in evidence. In our opinion this contention is well founded, and the finding of the learned District Judge based upon the opinion contained in that letter must be discarded. This does not however conclude the appeal.

The learned advocate contends that inadmissible evidence having been used in coming to a finding about the tampering of the hand-notes, it is impossible to say to what extent the learned District Judge was influenced by that inadmissible evidence. We therefore under S. 103, Civil

P. C., as it now stands, examined the hand-notes and the evidence ourselves in order to come to conclusions about their interpolation or otherwise. We have carefully examined the two hand-notes, and there is no doubt left in our minds that the contention of the defendant is well founded. (After describing the alterations the judgment proceeded). This apparent change of words and figures in both the hand-notes cannot be held to be accidental, and in our opinion the learned District Judge came to right conclusions in this respect. We have examined the evidence of the plaintiff's witnesses who have come to prove execution of the two hand-notes and have considered the reasons given by the learned District Judge for disbelieving them. The reasons are sound, and we agree with the conclusions arrived at by the learned District Judge.

A question arose whether the plaintiff was not entitled to a decree for the admitted loan of Rs. 65 the plea of payment having been disbelieved by the learned Munsif and not having been believed by the learned District Judge. But in this respect also in our opinion the finding of the learned District Judge is correct. Having come to Court with tampered handnotes the plaintiff is not entitled to any decree as was held in the case of *Dula Meah v. Abdul Rahaman* (A. I. R. 1924 Cal. 452). The same principle seems to have been laid down in an earlier case of *Gour Chandra Das v. Prasanna Kumar Chandra* (1). The result is that this appeal is dismissed with costs. Any proceeding for the prosecution of the plaintiff which might have been taken in consequence of the learned District Judge's orders will now proceed in the usual course without undue delay.

M.N.

Appeal dismissed.

(1) [1906] 33 Cal. 812=10 C. W. N. 788=3 C. L. J. 363.

A. I. R. 1932 Patna 353

COURTNEY-TERRELL, C. J. AND

FAZL ALI, J.

Baraik Karan Singh—Appellant.

v.

Bikram Sahu and others—Respondents.

Letters Patent Appeal No. 45 of 1931, Decided on 9th March 1932, against decision of Wort, J., D/- 24th April 1931, in S. A. No. 1326 of 1929.

1932 P/45 & 46

Chota Nagpur Tenancy Act (1908), Ss. 177 and 218—Deputy Collector purporting to decide question of title—Appeal lies to Deputy Commissioner and not to Judicial Commissioner—His decision would not be res judicata in subsequent title suit.

Even where the Deputy Collector acting under S. 177 goes beyond the functions assigned to him under the section and purports to decide a question of title, appeal from his decision would lie to the Deputy Commissioner and not to the Judicial Commissioner. His decision does not bind the authorities in the least and cannot be used as res judicata in any subsequent title suit which may be brought under the proviso at the end of that section: *A. I. R. 1924 Pat. 807* and *C. W. N. 341, not App.*; *A. I. R. 1919 Pat. 96, Rel. on.*; 3 *W. R. (Act. 10 Rulings 21), Foll.*

[P 355 61]

S. K. Mazumdar—for Appellant.*H. Kumar*—for Respondents.

Courtney-Terrell, C. J.—This case raises a point of procedure under the Chota Nagpur Tenancy Act. The plaintiff sued tenants for rent the amount of the claim being under Rs. 100. The appellant before us who is a third party intervened in the suit under the procedure provided by S. 177 of the Act and asserted that he (the intervenor) had actually and in good faith received and enjoyed the rent before and up to the time of the institution of the suit. The suit was tried under the section before the Deputy Collector who delivered his decision holding that the intervenor had made out his claim and had in fact bona fide received the rent. The Deputy Collector went beyond the functions assigned to him by S. 177 and observed that in the circumstances the relationship of landlord and tenant had not been established by the plaintiff and used expressions which might be taken as a decision that the intervenor was the rightful landlord. Now the section clearly prevents any question of title being investigated in a rent suit of this character and the proviso to the section clearly states that a decision under the section shall not affect the right of any party who may have a legal title to such rent to establish such title by suit in a civil Court if instituted within one year from the date of the decision.

From this decision the landlord plaintiff appealed and under the impression, which is an excusable impression in the circumstances, that the decision had affected the question of title as between himself and tenants he appealed to the Judicial Commissioner. The section

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which regulates appeals under the Chota Nagpur Tenancy Act is S. 218 and under sub-S. (2) of that section an appeal lies from the Deputy Collector to the Deputy Commissioner, but in questions of title an appeal lies to the Judicial Commissioner and for this reason the landlord, as I have said, preferred his appeal to the Judicial Commissioner. The Judicial Commissioner proceeded to deal with the case and apparently had not his attention called to the contention that the appeal should have lain not to him but to the Deputy Commissioner. He decreed the suit and decided against the intervenor.

The intervenor carried the case on appeal to a single Judge of this Court and raised the contention that the appeal to the Judicial Commissioner was incompetent and that under S. 218 (2) the appeal should have lain to the Deputy Commissioner. Wort, J., who heard the appeal, was of opinion that the contention of the appellant was sound, but he felt himself constrained by the judgment of a single Judge of this Court which purported to follow a decision of the Calcutta High Court. That judgment is one by Adami, J., in the case of *Janki Chaudhury v. Sambodh Kurmi* (1). In that case the learned Judge came to the following conclusion. He agreed that S. 177, Chota Nagpur Tenancy Act, precluded the Deputy Collector from going into any question of title but inasmuch as in that case the judgment of the Deputy Collector had (as indeed in the case before us) gone beyond the mere question of fact which it was incumbent upon him to decide and purported to decide further a matter of title, the learned Judge considered that an appeal would lie not to the Deputy Commissioner but to the Judicial Commissioner as involving a question of title. It is to be noted that Adami, J., based his decision upon a judgment of a Division Bench of the Calcutta High Court in the case of *Lall Bhim Singh v. Guman Ghanjhu* (2) where a similar view had been taken and therefore it is necessary to examine the decision of the Division Bench of the Calcutta High Court.

It has been pointed out by a learned commentator with reference to an Act which at that time corresponded to the

present Chota Nagpur Tenancy Act and contained a section similar to S. 177 of the present Act, that the decision in *Lall Bhim Singh v. Guman Ghanjhu* (2) was apparently arrived at without a proper examination of the authorities which preceded it and the attention of the learned Judges was not called to those authorities and notably to the decision of the Full Bench of the Calcutta High Court in the case of *Syed Rameedoddeen v. Syed Maulvi Razeooddeen Ahmed* (3) where the precise point was examined. I may mention that the present S. 177 corresponds to S. 77 of Act 10 of 1859 and the learned Judges had to decide the point which in fact has to be decided by us. The following passage from their judgment may be quoted :

"It has been contended before us that in an inquiry under S. 77 of the right to receive rent is investigated; that this right is an interest in land and that therefore an appeal lies to the Judge, but we cannot assent to this reasoning. We think that under S. 77 the only matter enquired into is the fact of the actual receipt and enjoyment of rent before and up to the time of the commencement of the suit, that this fact is totally unconnected with the legal title to or any interest in the land or with the right to receive the the rent which is by the proviso of the section reserved for inquiry in the civil Court, and that consequently no appeal lies to the Judge under Ss. 153 and 160, Act 10 of 1859."

There is no doubt that had the attention of the learned Judges whose judgment is reported in the case of *Lall Bhim Singh v. Guman Ghanjhu* (2) been drawn to this decision the case would have been decided otherwise and consequently the judgment of Adami, J., would have been other than it is. That the view I have taken is the sound one is also indicated by the judgment of a Division Bench of this Court in the case of *Lachminarain Agarwala v. Thakurhari Dutta* (4) where the opinion is expressed that the functions of the Deputy Collector under S. 177, Chota Nagpur Tenancy Act, are restricted to a decision upon the question of fact as to who had actually in good faith received and enjoyed rent before the institution of the suit. In these circumstances I feel myself unconstrained by the judgment of Adami, J., and would not follow his decision nor the decision of the Calcutta High Court in the case of *Lall Bhim*

(1) A. I. R. 1924 Pat. 807=84 I. C. 286.

(2) [1897] 1 C. W. N. 341.

(3) 3 W. R. (Act 10 Rulings 21).

(4) A. I. R. 1919 Pat. 90=50 I. C. 712=4 Pat L. J. 163.

Singh v. Guman Ghanjhu (2) to which I have referred. In my opinion if the Deputy Collector goes outside the functions provided for him in the section his decision does not bind the authorities in the least and cannot be used as *res judicata* in any subsequent title suit which may be brought under the proviso at the end of that section. Indeed if the purported decision on a question of title were to be held to bind the parties it would render the proviso at the end of the section a nullity. Otherwise if a suit were to be brought as contemplated by the proviso a party would be able to raise the defence of *res judicata* and that is clearly not the intention of the section. I would accordingly allow this appeal holding that the appeal to the Judicial Commissioner was misconceived and would direct that the appeal which was in fact lodged before the Judicial Commissioner should be placed before the Deputy Commissioner for decision and in view of the fact that the appellant did not raise the question of jurisdiction before the Judicial Commissioner I would deprive him of the costs of the appeal to the learned Judge of this Court and of this Letters Patent Appeal.

Fazl Ali, J.—I agree.

S.N./R.K.

Appeal allowed.

A. I. R. 1932 Patna 355

COURTNEY-TERRELL, C. J. AND

FAZL ALI, J.

Muhammad Raza—Appellant.

v.

Zamiruddin—Respondent.

Letters Patent Appeals Nos. 36 to 41 of 1931, Decided on 2nd March 1932, against decision of Rowland, J., D/- 10th April 1931.

(a) Practice—Procedure—Duty of Court.

The relative position in the legal hierarchy between laws and procedure should be rigidly observed and procedure should not be dignified by being elevated to a set of leading principles.

[P 356 C 1]

(b) Bengal Tenancy Act (1885), S. 148 — Particulars of survey plots not given — Suit should not be dismissed but amendment should be allowed on payment of costs — Civil P. C. (1908), O. 6, R. 17 — Practice, Procedure.

Section 148 merely lays down the procedure for suits for rent, and does not affect in any way the rights of landlords to recover rent or the rights of tenants to resist the payment of rent. So also S. 148 (b 1) requires that the plaintiff shall set forth a list of the survey plots comprised in the tenancy and a statement of the rental of the tenancy according to the Record

of Rights. If the plaintiff does not contain those particulars or if it contains such particulars erroneously set forth, the Court should give the plaintiff opportunity to supply those particulars. The suit should not be dismissed but should be allowed to be amended on payment of costs : A. I. R. 1931 Pat. 135, *Rel. on.*

[P 356 C 1]

Khurshaid Husnain and Syed Ali Khan—for Appellant.

B. C. Sinha—for Respondent.

Courtney-Terrell, C. J.—These six analogous Letters Patent appeals arise from six out of 43 suits brought by the plaintiff against a number of defendants for rent of their holdings and the point for our decision arises only in connexion with these six suits. The suits were framed as claims for rent and the plaintiff in each case set forth the khata number of the holding in respect of which the claim was made. The plaintiff then went on to set forth the plot numbers appertaining to the plots comprised in the khata and it appears that the list of plot numbers was in each of these six cases incorrectly given. In some cases the specification in the plaintiff did not comprise the whole of the plot numbers in the holding and in some cases it set forth plots which were not in fact comprised in the holding.

The Munsif in dealing with these six suits dismissed them on the ground that they did not comply with the rule that a rent suit must be in respect of the entire holding and for nothing but the rent of the holding. When the matter came before the learned Subordinate Judge he was of opinion that the Munsif should have, as he was in fact requested to do, allowed an amendment of the plaintiffs so as to bring the plot numbers into conformity with the facts as regards each plot. He therefore reversed the decision of the Munsif in so far as it related to these plots and decreed the suits in favour of the landlord-plaintiff. The matter then went in second appeal to a learned Judge of this Court sitting singly who was of opinion that the amendment effected by the Subordinate Judge should not have been effected. He held that the amendment transgressed the rules of procedure that an amendment must not be allowed which changes the character of the suit.

Now with the greatest respect to the learned Judge of this Court I am of opinion that his judgment was erroneous

because it confused in principle the considerations which affect matter of procedure with the considerations which affect the matter of the rights of the parties. It is common experience that when a Code of Procedure is laid down it gradually becomes elevated by the Courts into a Code not of procedure but of law. The relative position in the legal hierarchy between laws and procedure should be rigidly observed and procedure should not be dignified by being elevated to a set of leading principles. S. 148, Ben. Ten. Act, lays down the procedure which is to govern suits for rent. It does not affect in any way the rights of landlord to recover rent or the rights of tenants to resist the payment of rent but it merely lays down the principles which are to govern the process for the recovery of rent and S. 148 (b1) requires that the plaintiff shall set forth a list of the survey plots comprised in the tenancy and a statement of the rental of the tenancy according to the Record of Rights unless the Court is satisfied that the plaintiff was prevented by sufficient cause from furnishing such particulars. Now the rule is merely a rule for the giving of particulars in a plaint.

If the plaint does not contain those particulars the defendant may apply for them and the Court may of its own motion say that it refuses to allow the suit to proceed further unless those particulars are furnished but it is nowhere said and nowhere implied that the suit is to be dismissed if the plaint does not contain the required particulars or if it contains such particulars erroneously set forth. I should have thought that that point had been sufficiently decided by the judgment of this Court in the case of *Kesho Prasad Singh v. Ramdhar Rai* (1) where the matter was discussed at length and was precisely the same matter which has been raised in this appeal. In this case the learned Subordinate Judge allowed the amendment. It was open to the learned Judge to penalize the party whose negligence had necessitated the amendment by the infliction of an order for costs and that is the normal and proper way in dealing with errors of procedure and the power to inflict such a penalty is ample to protect the parties. In my opinion therefore these six appeals should be allowed with costs in this

(1) A I.R. 1931 Pat. 135=128 I. C. 785.

Court (including the costs of the hearing before the Judge of this Court sitting singly) and before the Subordinate Judge. With regard to the costs of these six suits before the Munsif a different order should, I think, be passed. The unfortunate course of this case has been largely brought about by the negligence of the plaintiff in setting forth his claim in his plaint and therefore he should pay the costs of the hearing before the Munsif.

Fazl Ali J.—I agree.

R.K.

Appeals allowed.

A. I. R. 1932 Patna 356

Special Bench

COURTNEY-TERRELL, C. J., FAZL
ALI AND AGARWALA, JJ.

Babu Awadh Bihari Lal, Mukhtar, In the matter of.

Civil Ref. No. 2 of 1932, Decided on 16th August 1932.

Legal Practitioners Act (1879), S. 14 — Asking client to give gratification to Court even after conclusion of case is misconduct.

A mukhtar who advised his clients that it might be good thing after the conclusion of the case in which they had been acquitted to present some gratification to the Magistrate is guilty of deplorable misconduct and liable to suspension. [P 357 C 1]

S. N. Sahay and R. K. L. Nandkeolyar—for Mukhtar.

Government Advocate—for the Crown.

Courtney-Terrell, C. J. — This is a reference relating to one Babu Awadh Bihari Lal, a mukhtar practising at Nawada in the Gaya District. He had in the month of August 1931 defended an individual named Karmania Goala who was charged with an offence before the Sub-Deputy Magistrate of Nawada and the Sub-Deputy Magistrate had delivered judgment acquitting the accused on the 31st of that month. A few days later Karmania and a companion carrying a basket of sweets and an earthen pot of ghee came to Nawada and there they were clearly on their way to the house of the Sub-Deputy Magistrate. They were met by a peon and a conversation took place with the peon as to the nature of which the evidence is entirely unreliable but that they did have the conversation with the peon about the ghee and sweets and that it related to a visit or proposed visit to the Sub-Deputy Magistrate's house is beyond doubt. The two men went to the Sub-Deputy Magistrate's house, were met by him and told

him that they had brought the ghee and sweets for his children and told him that they had brought the ghee and sweets on the advice of the mukhtar. The Sub-Deputy Magistrate indignantly turned them out and sent for the mukhtar and in the presence of a gentleman of some position in the neighbourhood questioned the mukhtar as to what was the meaning of such extraordinary conduct on his part.

The mukhtar has in the inquiry which has been made by the Subdivisional Officer denied that he made the statements which the Sub-Deputy Magistrate and the gentleman I have mentioned attributed to him and which he must be taken to have made. First of all he in an abashed way seems to have told them that he had told the clients to bring the ghee and sweets but he told them to bring it for another official, the Sub-Registrar. Afterwards he somewhat modified that statement and before the Subdivisional Officer he says that he never said anything of the sort to these gentlemen but what he had said was that he had told his clients to bring ghee for his own (the mukhtar's) use. The Subdivisional Officer was entirely justified on that evidence in finding, as he did, that the conversation which really took place between the mukhtar and the Sub-Deputy Magistrate and the other witnesses was as those latter persons have described and not as the mukhtar describes and upon that finding he was justified, and we agree with his finding, in coming to the conclusion that the mukhtar had advised his clients that it might be a good thing after the conclusion of the case in which they had been acquitted to present some gratification to the Sub-Deputy Magistrate. Such conduct on the part of a mukhtar or any legal practitioner is obviously disgraceful. Perhaps it is not so bad as a direct approach to the judicial officer with gifts before the case is tried but as an example of misconduct it is positively deplorable. The mukhtar must in the circumstances be punished for the offence. He has been under suspension from 23rd September 1931 and he will continue under suspension until 23rd September next making one year which we think is ample punishment in the circumstances, he being, we are told, a young man and capable of learning better professional ways. (The judg-

ment gave directions for expediting such cases and closed).

Fazl Ali, J.—I agree.

Agarwala, J.—I agree.*

M.N./R.K.

Order accordingly.

A. I. R. 1932 Patna 357

COURTNEY-TERRELL, C. J. AND
FAZL ALI, J.

Nageshwar Prasad—Decree-holder—
Appellant.

v.

Jai Bahadur Singh—Judgment-debtor—
Respondent.

Appeal No. 254 of 1931, Decided on 1st March 1932, against appellate order of Dist. Judge, Saran, D/- 29th August 1931.

Civil P. C. (1908), S. 11—Execution proceedings—Previous objections dismissed in default of both parties can be raised again.

In an execution case the judgment-debtor raised certain objections. They were dismissed in absence of both parties, the execution itself being subsequently dismissed. In a subsequent execution the judgment-debtor again raised objection.

Held: that as the previous objections had been dismissed in default of both parties, under the principles of S. 11 the subsequent objections were maintainable: 28 Cal. 122, *Rel. on*; A. I. R. 1924 Pat. 122, *Dist.*; 8 Cal. 51 (P. C.), *Ref.*

[P 358 C 1, 2]

B. N. Mitter and *P. B. Ganguly*—for
Appellant.

H. P. Sinha for *Bhagwan Prasad*—
for Respondent.

Fazl Ali, J.—It appears that a money decree was obtained by the Kayasth Bank of Gorakpur against Mt. Basmati and Indrawati in the year 1918. The decree was assigned to the appellant who proceeded to execute it and filed the first execution petition on 25th September 1929. It is said on behalf of the appellant that the respondent who is the son of one of the judgment-debtors appeared and raised certain objections to the execution but the objections were dismissed on 9th November 1929 in the absence of both the judgment-debtor and the decree-holder. The execution case was also struck off on 7th January 1930. On 30th January 1930 another application for execution was filed on behalf of the appellant and was duly registered. On 23rd June 1930 the respondent appeared and objected to the execution. It may be noted here that the appellant's case is that the objections raised on this occasion were identical with the objections raised in the previous execution case. The

learned Munsif in whose Court the execution proceedings were pending held that the respondent was debarred from raising the same objections on the principle of res judicata and he directed the execution to proceed.

Then there was an appeal to the District Judge who held that the principle of res judicata did not apply in the circumstances of the case because in the first place the order sheet of the execution proceedings did not show who was the objector and what the nature of the objections was in the previous execution case, and, secondly, because on the date on which the objections were dismissed for default neither the decree-holder nor the objector was present and when the decree-holder was not present there was no necessity for the objector to press his objections. From this decision an appeal has been preferred to this Court and it is argued on behalf of the decree-holder that the learned Judge was wrong in holding that the matter was not res judicata and that the Court was competent to entertain the objections raised by the respondent. Reliance is placed in this connexion on *Jago Mahton v. Khirodhar Ram* (1) in which it was held by a Division Bench of this Court on the authority of the decision of the Judicial Committee in *Mungal Parshad Dichit v. Girja Kant Lahiri* (2) that where a judgment-debtor objects to the execution of a decree on the ground that the application is barred by limitation, and the objection is dismissed for default of the judgment-debtor, the latter is not entitled, when a subsequent application for execution is made, to object that the previous application was time barred. It appears however that before the Bench which decided that case reference was made to a decision of the Calcutta High Court in *Bholanath Dass v. Prafulla Nath Kundu Chowdhury* (3) which was distinguished by the learned Judges in the following manner :

In that case after several adjournments granted at the instance of the decree-holder neither party having appeared at the date of the hearing the Court by its order refused an application for execution and at the same time disallowed the objection of the judgment-debtor. On a subsequent application by the decree-holder the judgment-debtor again objected to the execution al-

leging that inasmuch as the previous application was barred by limitation the subsequent application was also barred. It was held in such circumstances that the judgment-debtor was not precluded from raising the objection that the previous application was barred by limitation. It appears to me that that was an entirely different case from the present and one in which entirely different considerations arose because no decision of any sort was come to in that case by the Court in the previous execution case. An execution case was started no doubt and certain objections were taken by the judgment-debtor but nobody after that appeared and the Court came to no decision upon any question. All that the Court did was to dismiss the execution case and at the same time dismissed the objections."

It seems to me that the facts of the present case bear a closer resemblance to the case decided by the Calcutta High Court than to the case of *Jago Mahton v. Khirodhar Ram* (1). As the learned District Judge has pointed out and as is also clear from the order sheets, neither the judgment-debtor nor the decree-holder was present on the day the objections were dismissed and in these circumstances there was no occasion for the executing Court to apply its mind to, and decide, the merits of the objections. Besides there ought to be some distinction between those cases where there is negligence on the part of both the parties and those where only one of the parties is at fault. In this connexion the learned advocate for the respondent refers us to certain provisions of O. 9, Civil P. C. and especially to O. 9, Rr. 3 and 8. It is pointed out by him that when a suit is dismissed under O. 9, R. 3 in the absence of both the parties it is clearly provided under O. 9, R. 4 that the plaintiff is not debarred from bringing a fresh suit, whereas it would not be open to him to bring a fresh suit if the suit is dismissed under O. 9, R. 8, that is to say, where the defendant appears and the plaintiff does not appear. In reply to this argument Mr. Mitter very rightly points out that the provisions of O. 9 do not apply to execution proceedings. At the same time S. 11, Civil P. C., on which the appellant relies is also not directly applicable to execution proceedings but it is not disputed that the principle underlying that section does apply and has been frequently applied by the Courts in this country to execution proceedings. It is clear that the principle upon which the provisions of O. 9, Rr. 3 and 4 are based is that a party is not to be precluded from bringing a fresh suit where there

(1) A. I. R. 1924 Pat. 122=74 I. C. 130=2 Pat. 759.

(2) [1882] 8 Cal. 51=8 I. A. 123=4 Sar. 248 (P.C.).

(3) [1901] 28 Cal. 122=5 C. W. N. 80.

was no occasion for the Court to apply its mind to the points raised in the suit and where there was laches on the part of both the plaintiff and the defendant. In such a case the penalty to be imposed on the plaintiff cannot be so severe as in those where there is default on his part only. It was on this principle, I think, that it was conceded in *Jago Mahton v. Khirodhar Ram* (1) that where both parties do not appear different considerations would arise. Mr. Mitter distinguishes the present case from the case of *Bholanath Dass v. Profulla Nath Kundu Chowdhury* (3) on the ground that in the latter case both the execution proceedings and the objections of the judgment-debtor were dismissed for default on the same day whereas in the present case the execution proceeding was dismissed some days later. There is no doubt that this is so, but it appears to me that merely because the execution case was dismissed a few days later in the present case, one cannot overlook the fact that on the day the objections of the judgment-debtor were dismissed neither the judgment-debtor nor the decree holder was present in Court. (The judgment after upholding the other findings of the lower Court concluded.) The appeal accordingly fails and must be dismissed with costs.

Courtney-Terrell, C. J.—I agree.

M.N.

Appeal dismissed.

*** A. I. R. 1932 Patna 359**

COURTNEY-TERRELL, C. J. AND
FAZL ALI, J.

Rameshwar Prasad Bhagat—Decree-holder—Appellant.

v.

Ram Ratan Ram and others—Judgment-debtors—Respondents.

Appeal No. 68 of 1931, Decided on 29th August 1932, against original order of Sub-Judge, Santal Parganas, D/- 3rd January 1931.

*** Civil P. C. (1908), O. 21, R. 16—Decree-holders members of joint Hindu family—Death of one leaving other as sole survivor—Survivor can apply for execution to Court executing decree—Nonmention of death of coparcener is not sufficient to reject application if Court knows in subsequent proceedings of fact of death—Case is governed not by R. 16, but by Civil P. C. (1908), O. 21, R. 15—Hindu Law, Joint family.**

Upon the death of a coparcener of a joint Hindu family his share and interest in the family property become extinct and the surviving coparceners become the full owners of the whole

estate. It is not a case of ~~test~~ has been paid interest held by the deceased coparcen mortgages total extinction or absorption of that ..

[P 36]

Hence where of the two decree-holders were members of a joint Hindu family one dies leaving the other as a sole survivor and he applies for execution to the Court to which a decree is transferred without mentioning the fact of the other's death in the application, the application is not incompetent in the transferee Court. It not being a transfer by operation of law, O. 21, R. 16, does not apply, but R. 15 does. If the fact of the coparcener's death is brought to the knowledge of the Court during execution proceedings, its nonmention in the application is not a vital omission to justify rejection of the application. [P 360 C 2]

S. C. Majumdar—for Appellant.

S. N. Banerji—for Respondents.

Fazl Ali, J.—This is an appeal by a decree-holder whose application for execution has been struck off by the Subordinate Judge of the Santal Pargannas. The facts of the case are briefly these: The decree which is sought to be executed was passed in favour of two persons, namely, Ganesh Lal Bhagat and the appellant Rameshwar Prasad Bhagat on 8th January 1918 in the Birbhum District. On 23rd June 1928 it was transmitted to the Court at Rajmahal for execution. On 30th July 1929 Ganesh Lal Bhagat one of the decree-holders died. On 13th December 1929 Rameshwar Prasad Bhagat applied for execution of the decree. It may be stated here that both Ganesh Lal and Rameshwar Prasad Bhagat were members of a joint family and as a result of the death of Ganesh Lal Bhagat, Rameshwar Prasad Bhagat became the sole person interested in the decree by right of survivorship. Two objections were taken on behalf of the judgment-debtors before the learned Subordinate Judge. It was urged in the first place that the appellant should have under O. 21, R. 15, Civil P. C., mentioned the fact of Ganesh Lal Bhagat's death in that execution petition itself and the fact not having been mentioned, the petition for execution could not be amended at a later stage. The second objection was that properly speaking the interest of Ganesh Lal Bhagat had been transferred to the appellant by operation of law and therefore under O. 21, R. 16, Civil P. C., the appellant should have made his application for execution to the Court which originally passed the decree.

The learned Subordinate Judge has held that in this case the appellant should

have made his application under O. 21, R. 16 before the Court which passed the decree and the application could not therefore be entertained by him. The real question thus is whether O. 21, R. 16 is applicable to the present case. It is urged on behalf of the respondents that in this case the interest of Ganesh Lal Bhagat has been transferred by operation of law to the appellant, but I do not think that this is a correct view. It is well recognized that upon the death of a coparcener of a joint Hindu family his share and interest in the family property become extinct and the surviving coparceners become the full owners of the whole estate. It is really not a case of the transfer of the interest held by the deceased coparcener, but the total extinction or absorption of that interest. It seems to me that O. 21, R. 16 is intended primarily for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law. Here the appellant is not a stranger, but one of the decree-holders and he claims to execute the decree not as a transferee, but as the surviving decree-holder. In my opinion therefore the present case falls under O. 21, R. 15 which provides that where a decree has been passed jointly in favour of more persons than one and any of them has died any one or more of such persons may apply for the execution of the whole decree for the benefit of the survivors and the legal representatives of the deceased. Here one of the decree-holders has died without leaving any legal representative and without leaving any other survivor except the appellant and therefore it is permissible for the appellant decree-holder to apply for the execution of the decree as if he was the sole decree-holder.

It is urged on behalf of the respondents that even though it may be assumed that the case will be governed by O. 21, R. 15 the fact of the death of Ganesh Lal Bhagat should have been mentioned in the execution petition and it should have been stated there that the appellant was executing the decree as a survivor. What has however to be remembered is that this provision has been enacted in

order to protect the interests of the persons other than the decree-holder applying for the execution of the decree and with this object sub-R. (2), O. 21, R. 15, provides that where the Court sees sufficient cause for allowing the decree to be executed on an application made under that rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. It is thus clear that the information is required under the rule merely to enable the Court to protect the interests of the persons who have not joined in the application. In this particular case there are no persons other than the appellant who are interested in the decree and it was not necessary for the Court to pass any orders under sub-R. (2), O. 21, R. 15. The facts that Ganesh Lal Bhagat is dead and that Rameshwar Prasad now claims to execute the decree as a survivor have been brought to the knowledge of the Court in the course of the execution proceedings and I do not think that the mere omission to mention the death of Ganesh Lal Bhagat in the execution petition is such a vital omission as to entitle the Court to reject the petition. In my opinion the Court should proceed to execute the decree after making a note of the fact that Ganesh Lal Bhagat is dead and that Rameshwar Lal Bhagat is the surviving decree-holder. I would therefore set aside the order of the Court below and allow this appeal with costs.

Courtney-Terrell, C. J.—I agree.
M.N. *Appeal allowed.*

A. I. R. 1932 Patna 360

COURTNEY-TERRELL, C. J. AND
FAZL ALI, J.

Nrisingha Charan Nandy Chowdhry—
Appellant.

v.

Rajniti Prasad Singh and others—Res-
pondents.

Misc. Appeal No. 215 of 1931, Decided on 4th May 1932, against decision of Dist. Judge, Gaya, D/- 5th October 1931.

(a) **Civil P. C. (1908), O. 40, R. 1**—Appeal—**Civil P. C. (1908), O. 43, R. 1 (s).**

An order holding that the case is one in which a receiver should be appointed is appealable : 9 I. C. 582 ; 29 I. C. 504 and 27 I. C. 646, *not Foll.*; A. I. R. 1922 Pat. 577 and 40 Mad. 18 (F. B.), *Rel. on.* [P 361 C 2]

(b) Civil P. C. (1908), O. 40, R. 1—Simple mortgagee cannot apply for appointment of receiver—Transfer of Property Act (1882), S. 67.

The mortgagee in the case of a simple mortgage merely has the right to sue upon the personal covenant or to bring the property to sale : he cannot satisfy his claim out of the rents and profits of the mortgaged property nor can he acquire the absolute ownership of the estate by foreclosure and hence he cannot obtain the appointment of a receiver upon failure to pay the mortgage interest : *A. I. R. 1931 Mad. 626* and *A. I. R. 1928 Cal. 545, Expl. [P 361 C 2 ; P 362 C 1]*

Sultan Ahmad and *S. N. Bose*--for Appellant.

P. R. Das, Manohar Lal, G. P. Das, N. C. Roy, B. B. Saran A. K. Mittra and *B. Prasad*--for Respondents.

Courtney-Terrell, C. J.—The plaintiffs on 24th March 1931 sued to enforce two mortgages of an impartible Raj in the Santhal Pargannas with an area of about three laks of acres. The first mortgage, dated 2nd February 1913, was executed by Jung Bahadur Singh the then holder of the estate for Rs. 2,00,000 at 6 per cent compound interest the due date being 1st February 1925. The second, dated 16th April 1917, executed by Sham Lal Singh a younger brother of Jung Bahadur, who had died since the first mortgage, was for Rs. 2,86,500 at 5½ per cent compound interest the due date being 15th April 1927. Each of the mortgages contained a clause entitling the mortgagees to call up the whole amount if interest fell into arrears for two years in the case of the first mortgage or five years in the case of the second mortgage. Later, on 9th December 1926, Sham Lal and his younger brother executed a usufructuary mortgage to defendant 19 for Rs. 40,000 with which money certain creditors were paid off and on the 15th of the same month defendant 19 was put into possession. After a very brief period however he was dispossessed by a receiver appointed in a suit between Sham Lal and his younger brother. After various civil and criminal proceedings defendant 19 was however ultimately re-instated in possession by the Court on 5th January 1931 and has been in possession since, realizing the rents and profits under his rights as usufructuary mortgagee. He has had to pay large Government demands and has also paid off other creditors and his claim amounts at present to Rs. 2,18,000. It

is admitted that no interest has been paid upon either of the first two mortgages since 8th June 1919.

This suit was begun within three months of defendant 19 gaining possession and the plaintiffs applied for the appointment of a receiver on three grounds firstly, that the interest on the first two mortgages was in arrears ; secondly, that the security had now become insufficient; and, thirdly, on the ground that defendant 19, the usufructuary mortgagee in possession was committing waste by cutting trees. The Court acceded to the application by the plaintiffs and appointed a receiver. From this order defendant 19 now appeals. A preliminary objection has been argued by the respondents to the effect that the District Judge has not in fact appointed a receiver but has merely decided that the case is one in which a receiver should be appointed and that the order therefore does not fall within the terms of O. 40, R. 1 and O. 43, R. 1 (s), Civil P. C. Reliance has been placed upon cases reported in *Upendra Nath Nag v. Bhupendra Nath Nag* (1), *Narbada Shankar v. Kevaldas Raghunath Das* (2) and *Ramji v. Koman Das* (3) in which a very narrow construction was placed upon the rule. I prefer the interpretation adopted by this Court in the case of *Gobind Ram v. Ganesh Ram* (4) which follows a Full Bench decision of the Madras High Court in the case of *P. L. S. Palaniappa Chetty v. P. L. P. P. L. Palaniappa Chetty* (5) and expresses a more common-sense view of the matter.

There is no need to review the discussion afresh and I would therefore reject the preliminary objection. (His Lordship after holding that security had not diminished and that the allegations of waste were not established proceeded). Now the plaintiffs base their claims on simple mortgages but the mortgagee in the case of a simple mortgage merely has the right to sue upon the personal covenant or to bring the property to sale : he cannot satisfy his claim out of the rents and profits of the mortgaged property nor can he acquire the absolute ownership of the

(1) [1910] 9 I. C. 582.

(2) [1915] 29 I. C. 504.

(3) [1915] 27 I. C. 646.

(4) *A. I. R. 1922 Pat. 577=1 Pat. 625=69 I. C. 929.*

(5) [1917] 40 Mad. 18=40 I. C. 185 (F. B.).

estate by foreclosure. In this respect he is in a position different from that of an English legal mortgagee who has a contractual right to the possession of the mortgaged property, and from an equitable mortgagee who is entitled by contract to be put into the position of a legal mortgagee with the privileges appertaining to that position. By reason of his right to possession direct or indirect the Courts, on the application of a legal or equitable mortgagee, may appoint a receiver. It is urged on behalf of the plaintiffs that a simple mortgagee under Indian law is in a position analogous to that of an equitable mortgagee and that whereas a legal mortgagee cannot obtain the appointment of a receiver, an equitable mortgagee could and so therefore ought a simple mortgagee. But the reason for the early refusal of the English Courts to appoint a receiver on the application of a legal mortgagee was that he already had a higher and legal right to personal possession. Since the Judicature Act and the fusion of legal and equitable jurisdictions a legal mortgagee has been conceded the right to a receiver: see Cotton, L. J., in *In re Pope* (6) and *Venkata Rajagopala Surya Raw Bahadur v. K. Basavi Reddy* (7). The right of an equitable mortgagee to have a receiver appointed is based on his right to be put by the Court into the position of a legal mortgagee. The same difference therefore between a simple mortgagee under Indian law and a legal mortgagee under English law exists between a simple mortgagee and an equitable mortgagee.

On behalf of the plaintiffs reliance was placed on observations by Madhavan Nair, J., in the case of *Venkata Kumara Mahipathi Surya Rao v. Gokuldoss Goverdhandass* (8). That was the case in which there had been an equitable mortgage by deposit of title-deeds and the mortgagee, at whose instance the receiver had been appointed, prayed that the receiver might be directed to deposit in Court the money realized by him from the mortgaged properties for the benefit of the mortgagee in preference to other creditors of the mortgagor. It was in

that case rightly decided that the receiver having been appointed at the instance of the equitable mortgagee must hold the income of the property for the benefit of the mortgagee. The creditors argued that inasmuch as the equitable mortgagee had no immediate right to take possession or foreclose he was in the same position as a simple mortgagee and so had no right to the appointment of a receiver in his own interest. This seems to have led the learned Judge to inquire whether a simple mortgagee could obtain a receiver which was not the point before him. He confronted counsel for the creditors with a case, to be hereinafter mentioned, in the Calcutta High Court, which seemed to decide this point in the affirmative. Counsel unnecessarily conceded that the point as to a simple mortgagee's right was so decided though he argued that it was wrongly so decided; whereupon the learned Judge said that if, as had been decided, a simple mortgagee could get a receiver so could an equitable mortgagee who also had no immediate right to foreclosure or sale. That is to say, he arrived at the correct conclusion but by means of a false premise. At p. 568 (of 54 *Mad*). he said:

"Admittedly, the rights of the petitioner who is an equitable mortgagee, are the same as those of a simple mortgagee, that is, he is not entitled to the possession of the properties under his mortgage; he can realize his dues only by getting a decree for selling them."

But the learned Judge had I think forgotten to notice that an equitable mortgagee although he cannot like a legal mortgagee take immediate possession has a contractual right to be put by the Court into the position of a legal mortgagee and it is this fact which is the basis of his equitable right to the appointment of a receiver—an equitable right which since the Judicature Act the legal mortgagee has enjoyed and but for the technical separation of law and equity he would always have enjoyed by reason of his right to possession. If the case of *Rameshwar Singh v. Chuni Lal Shaha* (9) be examined it will be found that it does not justify the contention put forward as to the right of a simple mortgagee to the appointment of a receiver. The plaintiffs had brought a mortgage suit in the Court of the Subordinate Judge impleading the mortgagors and

(6) [1886] 17 Q.B.D. 743=55 L.J.Q.B. 522=55 L.T. 369=34 W.R. 693.

(7) A.I.R. 1915 Mad. 133=26 I.C. 986.

(8) A.I.R. 1931 Mad. 626=133 I.C. 504=54 Mad. 565

(9) A.I.R. 1920 Cal. 545=56 I.C. 839=47 Cal. 418.

also the mortgagees under a later mortgage. A receiver had been appointed at the instance of the plaintiffs and in the presence and with the consent of the second mortgagees. The right of the plaintiffs to obtain such an appointment of receiver was not made the subject of appeal to the High Court who in the matter before them were merely asked to decide upon the soundness of a subsequent order by the Subordinate Judge that the receiver should pay half the profits and receipts to the second mortgagees and half to the plaintiffs. In deciding that point the Court said that neither the second mortgagee nor the mortgagor was in a position to question the appointment of the receiver. The Court says that it was "suggested" by the second mortgagees that a receiver ought not to have been appointed at the instance of a simple mortgagee and disagreed with that suggestion. But the matter does not seem to have been seriously argued and the observation by the learned Judges on this point are merely obiter dicta. In any case I am quite unable to agree with them. We have not been furnished with any case in which the right of a simple mortgagee to obtain the appointment of a receiver upon failure to pay the mortgage interest has ever been in question and directly affirmed.

Lastly, it is clear that under his usufructuary mortgage defendant 19 is entitled to the rents and profits of the mortgaged property and consequently, even if a receiver were appointed, he could act only in the interests of defendant 19 and not in the interests of the plaintiffs.

For these reasons I was in favour of the order made by us at the end of the last term allowing this appeal and setting aside the order of the District Judge and directing the plaintiffs to pay the costs of this appeal and of the Court below.

Fazl Ali, J.—I agree. Even assuming for the sake of argument that a receiver may be appointed in exceptional cases at the instance of one who holds a simple mortgage I am of opinion that it will be neither just nor convenient to appoint a receiver in this case. The person who is at present in possession of the properties is not the mortgagor but a usufructuary mortgagee. There is no reliable evidence whatsoever that he

has committed or has been committing any acts of waste or that the property is being mismanaged. The learned Subordinate Judge seems to have been of the opinion that the security in this case is insufficient, but in coming to this conclusion he proceeded on the assumption that the net annual income of the property mortgaged was a little over Rupees 46,000. It has however been pointed out to us that according to the current settlement proceedings the income has increased by almost 50 per cent. The question of interest is not a serious one in this case, because the rule of damdupat applies. The suit was instituted in March 1931 and being now over a year old must be ripe for hearing. It seems likely therefore that the suit will be decided before long and in these circumstances there does not appear to me any particular necessity for altering the status quo.

M.N.

Appeal allowed.

A. I. R. 1932 Patna 363

COURTNEY-TERRELL, C. J. AND
AGARWALA, J.

Kesheo Prasad Singh—Plaintiff—Appellant.

v.

Ram Baran Chaubey—Defendant—Respondent.

First Appeal No. 139 of 1929, Decided on 8th August 1932, against decision of Sub-Judge, Shahabad, D/- 28th February 1929.

Bengal Tenancy Act (1885), Ss. 44 (c) and 47—Tenant in occupation as raiyat—Landlord taking kabuliyat imposing period for lease—Suit to eject after period fixed—Tenant is entitled to count period of occupation from when he came in occupation as raiyat—Burden of proof is however on tenant—No relationship of raiyat created by kabuliyat—S. 44 or S. 47 has no application.

The general object of the Act is the protection of raiyats and if a person who has been a raiyat is inveigled by his landlord into executing a lease imposing upon him no harder terms than he has hitherto borne but stating that the lease is to come to an end after a certain fixed period of time, then the tenant who is sued by his landlord in ejectment on the ground that his lease has come to an end is entitled in view of Ss. 44 (c) and 47 to count the period of his occupation from the period when in fact he came into occupation as a raiyat, in spite of the term in the lease. The tenant must however show that he was in occupation of the land as a raiyat before the kabuliyat and that the lease is executed with a view to continuance of that occupation as a raiyat. Mere occupation is not enough if the kabuliyat however is one which does not create

the relationship of landlord and raiyat but creates the relationship of landlord and tenureholder; then neither S. 44 nor S. 47 has any application. [P 364 C 1, 2; P 365 C 1]

Sundar Lal, S. M. Mullick and R. N. Prasad—for Appellant.

P. Dayal and D. N. Varma—for Respondent.

Courtney-Terrell, C. J.—This appeal arises out of a suit for ejectment brought by the Maharaja Bahadur of Dumraon, against one Ram Baran Chaubey. It is alleged by the plaintiff that the defendant entered into a lease with him for the occupation of certain land and that the period of the lease had expired and therefore that the plaintiff was entitled to possession. The defence to the suit was that this lease which by the way defendant says he had been fraudulently induced to execute, was a raiyati lease, and that even if the term of the lease had expired the plaintiff had no right to eject him for the following reasons:

It is argued by the defendant that a non-occupancy raiyat cannot be ejected except for the reasons set forth in S. 44, Ben. Ten. Act, and whereas the plaintiff claimed that the lease had expired, in fact the defendant had not been admitted to occupation by reason of the lease but had been admitted to occupation before the date of the lease and had acquired occupancy rights and therefore could not be ejected. The defendant also relied on S. 47, Ben. Ten. Act, which enacts:

"Where a raiyat has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this chapter, notwithstanding that the lease may purport to admit him to occupation."

The defendant alleged that he had been in occupation prior to the date of the lease and that the lease was merely executed with a view to continuance of his occupation and therefore that he could not be deemed to be admitted to occupation by reason of the lease no matter what the lease itself might say. The point first arises as to the proper construction of S. 44 (c) and S. 47, Ben. Ten. Act. The effect of these two sections to my mind is this. It must be remembered first that the general object of the Act is the protection of raiyats and it may well be that a person who has been a raiyat may be inveigled by his landlord into executing a lease imposing upon him no harder terms than he has hitherto borne

but stating that the lease is to come to an end after a certain fixed period of time. The object of these two sections is to defeat this manoeuvre on the part of the landlord and for the purpose of counting the period of occupancy, the real period of occupation as a raiyat is to be taken into account and not the period of occupation which may happen to be stated in the lease. If therefore a defendant who is sued by his landlord in ejectment on the ground that his lease has come to an end is able to show that in fact before the date of the lease he was a raiyat and in occupation of that same land in that capacity he is entitled to count the period of his occupation from the period when in fact he came into occupation as a raiyat.

It has been argued by Mr. Parmeshwar Dayal on behalf of the defendant in this case that the meaning of the sections is not as I have just stated. He contends that provided the person sued (the defendant) can show that under the terms of the lease he is a raiyat and provided that he can show that prior to the lease which constituted him a raiyat he was in occupation of the land in any capacity, that the period of occupation as a raiyat is to date from the beginning of his period of occupation in fact, notwithstanding that such earlier occupation before the date of the kabuliyat was not that of a raiyat. That that interpretation is erroneous may, I think be illustrated by a simple example. We may suppose that A and B are two adjacent landlords, that A sells a portion of his land to B and that B in consideration of the price being low allows A under the terms of a kabuliyat, notwithstanding the sale of the portion of A's land, to remain in cultivation as a raiyat for fixed period of years, and that at the end of that period when B desired to eject A from the portion of the land A says:

"Not so. It is true that I have sold you this piece of land subsequently cultivating it as a raiyat for five years but whereas I was in occupation of land long before the commencement of the kabuliyat—it is true as an owner nevertheless I was in occupation long before the commencement of the kabuliyat and you cannot eject me. I am tied to you for ever and I am a raiyat for ever of this land under your landlordship."

Such an illustration demonstrates the impossibility of the construction for which Mr. Parmeshwar Dayal contends. In my opinion the true construction of

S. 47 is this: The defendant must show that he was in occupation of the land as a raiyat before the kabuliyat and that the lease is executed with a view to continuance of that occupation, that is to say, occupation as a raiyat. We approach the facts of this case now upon the basis of that construction of the sections. A great deal of time has been spent in discussing the precise nature of the kabuliyat. To my mind that is not very material for the determination of the case. It is true that if the kabuliyat is, as is contended by the plaintiff, one which does not create the relationship of landlord and raiyat but creates the relationship of landlord and tenure-holder then neither S. 44 nor S. 47, Ben. Ten. Act has any application but even if the kabuliyat does in fact create the relationship of landlord and raiyat if the raiyat, whose term under the kabuliyat has expired wishes to calculate his occupation from a period anterior to the commencement of the kabuliyat he must establish, as a matter of fact, that his relationship with his landlord prior to that created by the kabuliyat was that of landlord and raiyat and the onus is upon him to establish that contention of fact.

The learned Subordinate Judge who has dismissed this suit has done so by reason of the fact that he has omitted to take into account the proper construction of the sections of the Bengal Tenancy Act and he has agreed with the view set forth in this appeal by Mr. Parmeshwar Dayal and has held, as a matter of fact, that the defendant has shown that he was in occupation prior to the date of the kabuliyat. His attention has not been directed to the proper view that that is not sufficient but that the defendant must show that he was in occupation as a raiyat. In order to deal with the evidence on this point no simpler method can be employed than to approach the evidence of the defendant himself. According to his evidence it would appear that the land in dispute had formerly belonged to one Mohi Ahir, and that these lands were sold in execution of a rent decree which was obtained by the Dumraon Raj some considerable time before the kabuliyat. The *raj* got delivery of possession after the execution sale and the defendant, under some oral agreement, the precise nature of which was not specified by him, came afterwards into possession

of the land. He states that some of the land was in possession of raiyats and some remained in his possession. As to the raiyats he says that he realized rent from them and as to the rest he either realized the fruits of the bagicha land or cultivated that land which was not occupied by raiyats and he states that that state of affairs has continued. There are seven raiyats under the tenure he says. He produced a series of counterfoil rent receipt books showing the rents which he has taken from the raiyats and the learned Subordinate Judge has accepted the genuineness of these receipts. They are Exs. C to C.40 and what the learned Judge says is:

"These raiyats have produced rent receipts the genuineness of which I see no reason to doubt and from these receipts it is clear that Ram Baran has been realizing rent from the year 1326 Fasli."

Now the kabuliyat was not executed until the year 1327 F. and the series of receipts go back for several years. It is perfectly clear therefore that the position of the defendant before the date of the kabuliyat was that of one who held land which was in the cultivation of other persons from whom he received rent. He in his turn paid rent in respect of the entire land to the landlord, the Dumraon *raj*.

A remark may be made as to the position of the actual cultivating tenants of the land. These persons appear to have been in cultivating possession for quite a long time anterior to the date of the kabuliyat and anterior to the date when the Maharaja purchased the land. After the purchase by the Maharaja it is contended by him (the Maharaja) that they paid their rents to him although, as the learned Subordinate Judge points out, he has not been able to prove that to the Subordinate Judge's satisfaction. Nevertheless there being no intervening holder between the Maharaja and themselves the tenants cannot occupy any position other than that of raiyats and the person who succeeded to the position of the Maharaja in the right to receive the rents cannot also be in the position of a raiyat in respect of the land for which the original raiyats still continue to pay him rent. The position therefore of the defendant prior to the date of the kabuliyat is certainly not established as that of a raiyat even if it be not conclusively established what precise position he held. I am in-

clined to think from the evidence that he was in fact in the position of taking rent from the tenants and cultivating the soil which was not in fact occupied by the tenants. In that capacity he is not a raiyat and may properly be described as a tenure-holder. It has therefore in my opinion not been established by the defendant, as it was his duty to establish if he wished to avail himself of the defence he raised, that prior to the tenancy he held as a raiyat. In these circumstances and in view of what I consider the true construction of S. 47, Ben. Ten. Act, he is unable to take advantage of such occupation as he had if any, prior to the date of the kabuliyat. S. 44 (c) applied to the case, the period of tenancy has expired; in default of the defendant showing that he had a prior occupation as a raiyat his occupation as a raiyat must be deemed in the absence of other evidence, to have commenced from the time of his kabuliyat and it must be presumed therefore that he was inducted upon his raiyati, occupation by reason of that kabuliyat the plaintiff is therefore entitled to eject the defendant. I would allow this appeal and set aside the judgment of the learned Subordinate Judge and decree the plaintiff's suit with costs throughout. The case will now go back to the lower Court for determination of the amount of mesne profits.

Agarwala, J.—I agree.

R.K.

Appeal allowed.

*** A. I. R. 1932 Patna 366**

MACPHERSON AND JAMES, JJ.

Nandkeshwar Prasad Sahi—Petitioner.

v.

Sita Saran Sahi—Opposite Party.

Criminal Ref. No. 42 of 1932, Decided on 30th August 1932, made by Sess. Judge, Muzaffarpur, D/- 2nd July 1932.

(a) Criminal P. C. (1898), Ss. 145 and 146—Conditions necessary for application of S. 145 enunciated.

The jurisdiction of the Magistrate to initiate proceedings under S. 145 is subject only to the limitations provided for in the section itself. It is altogether wrong to graft limitations upon the enactment which the legislature has not placed there. [P 368 C 2]

The only condition for a proceeding under S. 145 terminating in a finding under sub-S. (4) and an order under sub-S. (6) or an order under S. 146 is that the Magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning

any land or water or the boundaries thereof, within the local limits of his jurisdiction. Thereupon he is to call for written statements from the parties concerned in the dispute of their respective claims as respects the fact of actual possession of the subject of dispute; and he is to determine whether any and which of the parties was, at the date of the order initiating proceedings, in such possession of the said subject. [P 368 C 1, 2]

* (b) Criminal P. C. (1898), S. 145—Dispute as to actual possession likely to cause breach of peace—One party claiming exclusive possession of major portion—Others claiming possession of entire land—S. 145 is not in applicable.

Where there exists a dispute likely to cause a breach of the peace concerning the actual possession of land, the mere fact, that one set of persons claim exclusive possession over the major portion of it, while the other set of persons claim to be in joint possession along with them of the entire land, does not make it the less a question of disputed actual possession than if each party claimed exclusive possession of the entire area and does not make S. 145 inapplicable to the case: *A. I. R. 1920 Pat. 513* and *A. I. R. 1920 Pat. 835, Diss. from;* 4 C.W.N. 426 and 7 C.W.N. 118, *Expl. and Dist.*

[P 368 C 2]

Judgment.—This is a reference by the learned Sessions Judge of Muzaffarpur in respect of an order under S. 146, Criminal P. C.

The dispute was between parties, one of which claimed exclusive possession over the major portion of the land in controversy and the other of which claimed to be entitled to joint possession along with the first party of the entire land. The learned Sessions Judge has recommended that the order passed by the Magistrate under S. 146 to this Court be set aside, relying upon the decision in *Sham Lal v. Rajendra Lal* (1) which is substantially in pari materia.

The matter first came before a single Judge who referred it to a Division Bench so that the decision relied upon might be considered. It was the decision of a single Judge and appears to be based upon a similar decision of another single Judge in *Jogeshwar Das v. Emperor* (2) who perhaps failed to appreciate that the decisions on which he relied, are not really to the purpose. The two decisions in question are based upon two cases decided by the Calcutta High Court: *Tarujan Bibee v. Asamuddi Bepari* (3) and *Kristo Alhadini Dasi v.*

(1) *A. I. R. 1920 Pat. 513=58 I. C. 518=21 Cr. L. J. 790.*

(2) *A. I. R. 1920 Pat. 835=54 I. C. 1008=21 Cr. L. J. 224.*

(3) [1899] 4 C.W.N. 426.

Radha Shyam Panday (4). In *Tarujan Bibi v. Asamuddi Bepari* (3) the Magistrate had found that both parties were entitled to joint possession of the land in dispute; but he directed that one of them should hold actual possession until evicted by due course of law. The Court pointed out that the order that only one of the parties should be maintained in possession was not based on any finding that he and he alone had actual possession when cognizance of the matter in dispute was taken under S. 145. In his explanation to the Court the Magistrate said that both parties were in joint possession, so that it was manifest that the order evicting one of them under S. 145 in the absence of a finding that his joint possession had been obtained by the recent use of force, could not be maintained.

In *Kristo Alhadini Dasi v. Radha Shyam Panday* (4), the first party had purchased the property at a sale in execution and had obtained delivery of possession. The second party claimed that their share in the property was unaffected by the sale; and the Magistrate attached the property under S. 146, Criminal P. C. In his judgment he said that the second party's claim from the beginning was restricted to an undivided share in the land. It was pointed out by Stevens and Mitter, JJ., that the written statement of the second party asserted a claim not to an undivided share but to undivided possession; and the learned Judges remarked that if their claim was merely to an undivided share the order of the Deputy Magistrate was bad in view of the decision in the case of *Tarujan Bibee v. Assamuddi Bepari* (3), in which it was held that:

"Section 145 Criminal P. C., contemplates a dispute between two parties, each of which asserts the right to hold actual possession of the property as against the other and not a dispute between parties claiming to hold joint possession and neither contesting such right."

The learned Judges did not say that S. 145, did not contemplate a dispute between two parties one of whom claimed joint possession, while the other claimed exclusive possession and contested the opposite party's right; but they distinguished between a claim to an undivided share and a claim to undivided possession, and treated the Magistrate's order as bad because he dealt with the claims to

shares rather than with the claims to possession. They went on however to point out that even if there had been a claim on each side to exclusive possession the order of the Magistrate would have been wrong, because the first party had been put in possession of the property by the civil Court; and it would be the duty of the criminal Court to uphold the status of the first party as established by the civil Court. If any person had been wrongfully dispossessed as the result of the execution proceedings, he would have an opportunity of making an application in the proper form to have the matter dealt with by the civil Court. On the views expressed by the learned Judges, it would appear that the proper order for the learned Magistrate would have been in that case to declare the first party entitled to possession; but they contented themselves with setting aside the order attaching the land under S. 146, Criminal P. C. It does not appear that this decision affords any justification for the view that although the possession of a party who has been placed in possession by the civil Court must be protected against an opposite party claiming exclusive possession, the criminal Courts are to be powerless to make any order under S. 145 if the opposite-party should merely allow the claim of the first party to possession of an undivided share. Nor does it afford justification for the view that the provisions of S. 145 do not apply to a case in which one party claims exclusive possession and a breach of the peace is likely to ensue, from that party's attempting to exclude another party who has hitherto enjoyed joint possession, or to resist the attempt of the other party to disturb his possession by enforcing claim to joint possession with himself.

All that was actually decided in *Kristo Alhadini Dasi v. Radha Shyam Panday* (4) was that the provisions of S. 145 ought not to be applied to defeat the effect of delivery of possession by the civil Court. For the rest the learned Judges merely observed that where each of the parties admitted the right of the other to an undivided share, both being in joint possession, the provisions of S. 145 would not apply; and the Magistrate ought not to attach the property because he could not determine the respective shares; (nor to determine the

(4) [1902] 7 C.W.N. 118.

shares, because this is rather a question of title than of possession, in the sense of the term as used in the Code of Criminal Procedure). But when one party claims definite possession of certain land with definite exclusion of the other, the case is altogether different. The dispute is here regarding possession in the strictest sense of the term.

In our opinion this reference must be discharged. We are unable to accept as correct the view of the law which found favour in the decisions of this Court which have been referred to. The only condition for a proceeding under S. 145 terminating in a finding under sub-S. (4) and an order under sub-S. (6) or an order under S. 146 is that the Magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction. Thereupon he is to call for written statements from the parties concerned in the dispute "of their respective claims as respects the fact of actual possession of the subject of dispute" and he is to determine whether any and which of the parties was at the date of the order initiating proceedings in such possession of

the said subject. The jurisdiction of the Magistrate to initiate proceedings under S. 145 is subject only to the limitations provided in the section itself. It is altogether wrong to graft limitations upon the enactment which the legislature has not placed there. In the present instance and in instances of a like kind there exists a dispute likely to cause a breach of the peace concerning the actual possession of land. Because one set of persons claim exclusive possession over the major portion of it while the other set of persons claim to be in joint possession along with them of the entire land, the dispute may be difficult to decide (though it need not be if the Magistrate remembers what he has to decide and does not wander away into complicated or but dimly relevant questions of civil right), but it is in principle no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. In our judgment there is nothing in S. 145 or elsewhere in the Code of Criminal Procedure which renders it inapplicable to the case referred and similar cases.

We therefore discharge the reference.

R.K.

Reference discharged.

E N D

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